93-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public employer defending the constitutionality of an affirmative action plan may rely on a consent decree calling for race-conscious action to redress the effects of prior discrimination, and on the history of the litigation leading to that consent decree, as part of its justification for the challenged affirmative action plan.

2. Whether a public employer may consider statistical evidence of a manifest racial imbalance in its workforce in assessing whether it has engaged in unconstitutional discrimination that may be redressed by race-conscious affirmative action.

3. Whether an employer may utilize numerical promotional goals to redress prior discrimination when use of current promotional lists in strict rank order will fail to make meaningful progress toward eliminating the effects of prior discrimination, and when strict rank order use of those lists cannot be validated as job-related.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as the Mayor of the City of Chicago. The respondents are Chicago Fire Fighters Union Local No. 2, John M. Craven, Larry W. Anoman, Tedmund Duber, Timothy A. Andersen, Todd A. Lewandoski, Michael J. Kammerer, Robert S. Muir, Joseph Muscolino, Jeff P. McAndrews, Steven V. Parlick, Kenneth P. Bruno, Timothy J. Hayes, Joseph Pesce, Salvador Marquez, James G. Dorgan, Robert G. Michaels, Michael Greco, Richard Reimer, Michael Callahan, Robert Dreyer, James W. Fischer, Donald S. Sachula, Thomas J. Sullivan, Michael J. Sampey, Earl Billish, John Carasotti, Martin Dunne, Richard Graf, John Herling, Edward Jaquszewski, Dennis R. Smith, Henry Scavone, and John Schmidt.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
1. The discrimination cases brought by the United States	3
2. Promotions from the 1979 captains list—the *Billish* case	5
3. The 1987 affirmative action promotional goals —the *Chicago Firefighters* case	7
4. Proceedings in the district court	9
5. Proceedings in the court of appeals	10
REASONS FOR GRANTING THE PETITION	14
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Associated General Contractors, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992) 16, 20, 24
Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140 (2d Cir.), cert. denied, 112 S. Ct. 337 (1991) 28-29
Chicago Fire Fighters Local Union No. 2 v. Washington, 736 F. Supp. 923 (N.D. Ill. 1990) 2
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 15, 16, 23, 25, 26
Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990), cert. denied, 111 S. Ct. 516 (1991) 20, 24
Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 112 S. Ct. 875 (1992) 24, 26
Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990) 20, 21
Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992) 16, 19, 21, 24, 29
General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 26
Hazelwood School District v. United States, 433 U.S. 299 (1977) 25, 26
Howard v. McLucas, 871 F.2d 1000 (11th Cir.), cert. denied, 493 U.S. 1002 (1989) 21
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 25
Jansen v. City of Cincinnati, 977 F.2d 238 (6th Cir. 1992), cert. denied, No. 92-1555 (May 17, 1993) 19
Kirkland v. New York State Department of Correctional Services, 722 F.2d 1117 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984) 21
Local No. 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986) 15, 23

TABLE OF AUTHORITIES—Continued

	Page
Local 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986)	20
Maryland Troopers Ass'n, Inc. v. Evans, 1993 WL 143741 (4th Cir. May 6, 1993)	20
Martin v. Wilks, 490 U.S. 755 (1989)	18, 21
O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)	16
Officers for Justice v. Civil Service Comm'n, 979 F.2d 721 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993)	20, 28, 29
Setser v. Novak Investment Co., 657 F.2d 962 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064 (1981)	20
Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992)	16, 19, 20, 21, 24, 29
United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999 (6th Cir. 1992)	20
United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978)	3, 4
United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980)	21
United States v. Paradise, 480 U.S. 149 (1987)	15, 17, 23
Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992)	16, 19, 20, 21, 24, 29
Washington v. Davis, 426 U.S. 229 (1976)	25
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	15, 16, 23

CONSTITUTIONAL PROVISION:

U.S. Const. Amend. XIV, § 1	*passim*

STATUTES AND REGULATIONS:

42 U.S.C. § 1981	26
Pub. L. No. 102-166, § 108, 105 Stat. 1076 (1991)	23
29 C.F.R. § 1607.3(B) (1991)	29

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of Chicago and Mayor Richard M. Daley, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc, App., *infra*, at 1a-15a, is reported at 989 F.2d 890 (7th Cir. 1993). The opinion of the panel of the court of

appeals, App., *infra*, at 16a-83a, is reported at 962 F.2d 1269 (7th Cir. 1992). The court of appeals consolidated two cases that had been adjudicated separately in the United States District Court for the Northern District of Illinois. The opinion of the district court in *Chicago Fire Fighters Union Local No. 2 v. Washington*, App., *infra*, at 84a-106a, is reported at 736 F. Supp. 923 (N.D. Ill. 1990). The opinions of the district court in *Billish v. City of Chicago*, App., *infra*, at 107a-127a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves three sets of promotions in the Chicago Fire Department in which limited preferences were afforded to minority candidates. The Department utilized these preferences in order to comply with a consent decree that had ended a discrimination suit brought against the City of Chicago by the United States, and to redress long-term and pervasive discrimination within the Department, which had stunted the careers of minorities and left the upper ranks of the Department virtually bereft of blacks and Hispanics. The discrimination within the Department goes back some decades, although it continued until the mid-1980s; it led the United States to

file two separate suits against the City of Chicago, which resulted in a number of injunctive orders, and eventually a consent decree.

1. *The discrimination cases brought by the United States.* In 1973, the United States brought suit against the City of Chicago, alleging that the hiring and promotional practices of the Chicago Fire Department unlawfully discriminated against blacks and Hispanics. Billish R. 25 at Cole Aff. para. 5. At that time, less than 5% of the uniformed personnel in the Fire Department were black or Hispanic. *Id.* para. 6. The United States took an appeal from the district court's refusal to award preliminary injunctive relief against the Department's hiring practices, and the court of appeals enjoined all hiring pending appeal. *Id.* para. 7. At that point, the City concluded that it would not be able to defend the hiring claims successfully. *Id.* Accordingly, in 1974 the City entered into a consent decree that established an interim 50% hiring ratio and a long-range goal requiring the City to increase substantially the black and Hispanic composition of the Fire Department so that it would be more representative of the minority composition of the City's workforce as a whole. *Id.*[1]

The United States' suit also challenged as discriminatory the City's promotional examinations for the ranks of engineer, lieutenant, and captain. See *United States v. City of Chicago,* 573 F.2d 416. 419 (7th Cir. 1978). The district court upheld the validity of these tests under Title VII of the Civil Rights Act of 1964, as amended, see *id.* at 420, but the court of appeals reversed and remanded the case for further proceedings, see *id.* at 429. The court of appeals also enjoined all further

[1] The Department did little hiring over the next four years, and as a result the district court entered supplemental injunctive orders in September 1978 and again in June 1979, in order to ensure that an interim minority hiring ratio would remain in effect until the City made meaningful progress toward hiring minority firefighters. Billish R. 25 at Cole Aff. para. 8 & Exhs. K-L.

promotions to the ranks of engineer, lieutenant, and captain, pending further proceedings in the district court, unless all minorities on the relevant promotional lists were first offered promotions. See *id.* at 429.

In 1978, the City prepared and administered new promotional examinations for each rank in the Fire Department. Billish R. 25 at Cole Aff. para. 11. As of August 1979, when the City prepared to retire the existing promotional lists, the racial composition of the Chicago Fire Department by rank was as follows:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	99	0	1	1.0
Captain	218	12	1	6.0
Lieutenant	623	16	2	2.9
Engineer	366	13	1	3.8
Firefighter	2727	338	50	14.2

Id. para. 12.

In early 1980, the United States advised the City that it intended to file a new lawsuit challenging all four of the newly administered promotional examinations on the ground that they had a severe and unjustified adverse impact on minority candidates. Billish R. 25 at Cole Aff. para. 13. The City reviewed the United States' case and concluded that the examinations did have an adverse impact upon minority candidates and were not adequately validated. *Id.* para. 14. The City therefore decided that the case should be settled. *Id.* para. 15.

The City and United States entered into a consent decree, which the district court approved on March 31, 1980. Billish R. 25 at Exh. I. Section 1 of the consent decree required the City to make race-conscious promotions of minorities in a manner closely tailored to their numbers in the ranks eligible for promotion:

> *Long-Range Promotional Goal.* The defendants, as a long range goal, shall seek to promote black

> and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks of the City of Chicago Fire Department with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

Id.[2] Section 2(B) of the decree provides that if it proved necessary in order to meet the City's obligations to promote more minorities, the City would increase the number of minorities eligible for promotion from the 1979 engineers and lieutenants promotional lists "by reducing the cut-off score from 70, provided that any such reduction in a cut-off score need not exceed one standard deviation below the mean score obtained by black and Hispanic candidates as a group on the test involved." *Id.* Cut-off scores are set by utilizing a number of factors, including the difficulty of the test, the number of persons receiving high scores, and the estimated number of people to be promoted during the expected life of the promotion list. Billish R. 44 at Exh. A para. 3. Because some of these factors are arbitrary, the cut-off score does not necessarily define the minimum acceptable qualifications for promotion. *Id.* para. 4.

2. *Promotions from the 1979 captains list—the* Billish *case.* During the first four years that the 1979 captains list was in effect, there were sufficient qualified minority candidates promoted to lessen the disparity between the racial composition of the rank of captain and the pool of lieutenants eligible for promotion.[3] In March 1985,

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[2] Promotions are made to each rank from the rank immediately below it except in the case of lieutenant. Both firefighters and engineers are eligible for promotion to lieutenant.

[3] By January 1984, of 198 captains, 8 were black and 2 Hispanic, for a minority percentage of 5.1%, while of 718 lieutenants, 55 were black and 21 Hispanic, for a minority percentage of 10.5%. Billish R. 25 at Stensland Aff. para. 38.

however, the last minority on the 1979 captains list at or above the cut-off score of 70 or above was promoted. Billish R. 44 at Exh. A para. 10. All of the more than 50 persons promoted to captain after that were white, *id.* para. 11, and the racial disparity between the ranks of lieutenant and captain began to grow.[4]

In 1987, the Fire Department's operational needs required additional promotions to captain. *Billish v. City of Chicago*, Plaintiff-Appellants' Appendix on Appeal, Exh. V at 22-30. The Fire Department accordingly prepared to promote 18 white lieutenants to captain from the 1979 list. Billish R. 6. The City's Fire Commissioner, Louis Galante, concluded that the City's continuing use of a stale, promotional list that had been all-white for more than a year and a half was inconsistent with the consent decree, as well as with the City's contractual obligation to the Union to redress the effects of prior discrimination in the Fire Department. *Id.* at 31. Commisisoner Galante asked the Personnel Department if any minorities who had taken the 1979 captains examination were qualified for promotion. *Id.* at 28-29. The Personnel Department determined that there were two possibly qualified minorities, although their scores were slightly below 70. *Id.* at 29.

The Personnel Department then considered whether it would be appropriate, consistent with section 2(B) of the consent decree, to lower the cut-off score to enable the Fire Department to promote the two minority lieutenants to captain.[5] The Department of Personnel reviewed the

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[4] By January 1987, of 183 captains, 5 were black and 3 were Hispanic, for a minority percentage of 4.4%, while of 625 lieutenants, 63 were black and 18 Hispanic, for a 13.0% minority percentage. Billish R. 25 at Stensland Aff. para. 38.

[5] The City had twice before lowered the cut-off score for the 1978 engineers examinations: first for minority candidates pursuant to section 2(B) of the consent decree; and later for all

qualifications of the two minority candidates, determined that their scores were sufficiently high to consider them qualified for promotion, Billish R. 44 at Exh. A para. 8, and accordingly altered the cut-off score so that these two candidates could be placed on the list of those eligible for promotion. *Id.* at Exh. B at 8. Based on the Personnel Department's finding, Commissioner Galante ordered the two minority lieutenants promoted. Thus, 20 lieutenants were promoted to captain in January 1987, 18 of whom were white. *Id.* at Exh. A para. 11.

3. *The 1987 affirmative action promotional goals—the* Chicago Firefighters *case.* In 1983, when Commissioner Galante took office, he asked the City's Personnel Department to develop and administer new promotional examinations. Chicago Fire Fighters R. 71 at Joyce Aff. para. 7. The written portion of a new engineers examination was administered in January 1985. *Id.* para. 8. All firefighters were eligible to take the examination. *Id.* The practical portion of the examination was administered between July and November 1985. *Id.* para. 9. A rank order list of candidates for engineer in the order of their scores was then prepared. *Id.*

The written portion of a new captains examination was administered to candidates in September 1986. Chicago Fire Fighters R. 71 at Joyce Aff. para 11. All lieutenants were eligible to take this examination. *Id.* The oral interview component of the examination was administered in February and March 1987. *Id.* A rank order list of candidates based on their scores was then prepared. *Id.*

The racial composition of the Chicago Fire Department at the time the new engineers and captains promotional lists were compiled continued to reflect the effects of the

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candidates, because the list had remained in use longer than had been expected. Billish R. 44 at Exh. A para. 4. The City had also lowered the cut-off score for the 1978 lieutenants list in order to comply with the consent decree. *Id.* para. 7.

prior discrimination that had led to the suits the United States had filed—the manifest imbalance between the racial composition of each rank, and the rank or ranks below it from which promotions are made, had persisted, despite the City's obligation under the consent decree to reduce that disparity. The racial composition of the Fire Department by rank as of June 30, 1987, was as follows:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	97	1	1	2.0
Captain	194	5	2	3.6
Lieutenant	646	68	20	13.6
Engineer	464	44	7	11.0
Firefighter	2739	638	161	29.2

Chicago Fire Fighters R. 71 at Stensland Aff. para 19. The Chicago workforce, in contrast, was 46% minority (33% black and 13% Hispanic), according to 1980 census figures. *Id.* at Joyce Aff. para. 15.

The new engineers and captains examinations could not be validated for use in strict rank order because the City could not show that the quite small differences in scores between candidates when listed in rank order accurately predicted a difference in job performance. Chicago Fire Fighters R. 71 at Joyce Aff. para. 12 & Barrett Aff. paras. 6, 17. A test that may be valid for making distinctions between candidates with substantially different scores may not be valid for distinguishing between candidates with scores only a few points apart. *Id.* para. 16.

In deciding whether the two promotional lists would be used in strict rank order, the City's Commissioner of Personnel, Jesse Hoskins, evaluated a number of factors. In the written findings that accompanied his decision, Commissioner Hoskins noted the statistical evidence indicating that the effects of prior discrimination in the upper ranks of the Fire Department had persisted, and that this problem could be redressed only by promoting minorities

more quickly than strict rank order use of the list. Chicago Fire Fighters R. 71 at Exhs. E & F. Commissioner Hoskins also noted that the consent decree required promotion of minorities at a rate that would make the racial composition of each rank more representative of the composition of the rank eligible for promotion. He observed that without some type of race-conscious affirmative action, no meaningful progress could be made toward this goal. See *id.* Similarly, Commissioner Hoskins noted that the pertinent collective bargaining agreement required the City to promote minorities in order to redress prior discrimination, and that the lists could not be validated for use in strict rank order. See *id.* Accordingly, he concluded that both lists should be utilized with promotional goals of 20% black candidates and 5% Hispanic candidates. See *id.* Commissioner Hoskins concluded that these promotional goals would not unduly trammel the interest of nonminorities, because there was no meaningful difference between the scores of minority candidates who would be promoted out of rank order and the scores of the nonminority candidates who would be passed over, and because use of these goals would result in minority hiring at rates not substantially different from minority representation in the ranks eligible for promotion. See *id.*

Commissioner Galante then issued two promotional orders utilizing the affirmative action goals. In August 1987, he promoted 56 firefighters to engineer, including seven minority firefighters promoted out of strict rank order. Chicago Fire Fighters R. 71 at Exh. N. In October 1987, he promoted 24 lieutenants to captain including one Hispanic promoted out of strict rank order. *Id.* at Exhs. F & N.

4. *Proceedings in the district court. Billish v. City of Chicago* was brought by nine white lieutenants who alleged that Commissioner Galante's decision in January 1987 to promote two minority lieutenants to captain out of rank order deprived them of a property interest in their

promotions without due process of law, and discriminated against them because of their race, in violation of the Equal Protection Clause. Billish R. 1. The district court granted the defendants summary judgment on the due process claim, on the ground that state law granted no protectible property interest in promotions in strict rank order. App., *infra,* at 123a. The district court later granted the defendants summary judgment on the equal protection claim, on the ground that the decision to promote the 2 minority lieutenants along with 18 white lieutenants was permissible in light of the manifest racial imbalance between the ranks of lieutenant and captain, which had been exacerbated by the City's unjustifiable use of a stale, all-white promotional list. App., *infra,* at 110a.

Chicago Fire Fighters Local Union No. 2 v. Washington was brought by the Union and 20 of its white firefighter members, alleging that the promotion of minority candidates out of strict rank order in August and October 1987 violated the Equal Protection Clause. Chicago Fire Fighters R. 19. The district court dismissed the claims of 14 of the individual plaintiffs on the ground that they lacked standing to challenge the non-rank order promotions at issue. Chicago Fire Fighters R. 55. The district court subsequently granted the defendants' motion for summary judgment as to the remaining plaintiffs, concluding that the challenged promotions were part of a plan narrowly tailored to redress the continuing effects of prior discrimination in the Fire Department. App., *infra*, at 103a.

5. *Proceedings in the court of appeals.* The plaintiffs in both the *Billish* and *Chicago Fire Fighters* cases appealed. The court of appeals consolidated the two appeals for argument and decision, and invited and received an amicus brief from the United States because of the potential impact of the court's decision on the consent decree between the City and the United States.

A divided panel of the court of appeals, in an opinion by Judge Ripple and joined by Senior District Judge Grant, affirmed the judgment of the district court in the *Chicago Fire Fighters* case, and vacated the judgment of the district court in *Billish*. Turning first to the *Chicago Fire Fighters* case, the majority affirmed the dismissal of those individual claims that had been rejected for lack of standing, because those individuals would not have been promoted even if the City had proceeded in strict rank order, and because they were likely to receive promotions in subsequent promotional orders. App., *infra*, at 31a-33a. As to the merits of the equal protection challenge, the majority observed that "a necessary prerequisite to undertaking a program designed to remedy discrimination is a strong factual basis for believing that discrimination occurred." *Id.* at 34a. The opinion reviewed the four types of evidence on which the City had relied to establish its "strong basis in evidence," and found that they collectively supply a constitutionally sufficient justification for the City's conclusion that it had engaged in discrimination that it should rectify. *Id.* at 50a-51a.

First, the 1980 consent decree, as well as the history of the litigation leading up to it, established that the City had a basis for concluding that it had engaged in prior discrimination. Given the strength of the case brought against the City, the record made "clear that the City of Chicago's assessment that its policies violated the Constitution was a realistic one." App., *infra*, at 36a. Second, the Union's own agreement to an affirmative action clause in its collective bargaining agreement with the City, which required the City to promote minorities in a manner that would make their representation throughout the Fire Department more closely reflect their representation in the qualified workforce, also provided an evidentiary basis for the City's conclusion that it had engaged in prior discrimination. *Id.* at 41a. Third, the statistical evidence of a manifest imbalance in the racial composition of the pro-

motional ranks of the Fire Department allowed no probable explanation except that the City had discriminated against minorities. *Id.* at 41a-46a. Finally, some affirmative action for the rank of engineer was justified because the 1985 engineers examination could not be validated as job-related and would have had an adverse impact on the promotion of minorities if utilized in strict rank order. *Id.* at 46a-50a.

The majority then considered whether the City's promotional goals were narrowly tailored to redress prior discrimination. The majority concluded that they were because the City would not have made any meaningful progress toward eliminating the effects of prior discrimination if it used the promotional lists in strict rank order. App., *infra,* at 52a-53a. Nor could the City remedy the discrimination in the upper ranks by race-neutral procedures such as aggressive minority recruiting, because promotions to the rank of engineer and captain are made from the ranks immediately beneath them. *Id.* The affirmative action plan was also flexible, applicable only to qualified candidates whose scores were not significantly different from those of nonminority candidates, and only for so long as necessary to redress prior discrimination. *Id.* at 53a. In addition, the numerical goals were closely related to the minority composition of the ranks eligible for promotion, and hence did not unduly trammel the interests of nonminorities. *Id.* at 53a-54a. Finally, the impact of the plan on nonminorities was "minimal," since it "did not bar nonminority advancement, nor did it burden unduly nonminority candidates." *Id.* at 55a.

In the *Billish* case, the majority upheld the district court's dismissal of the due process claims, agreeing that state law did not afford any of the plaintiffs a protected property interest in receiving promotions. App., *infra,* at 69a-74a. As to the equal protection claim, the majority held that the same reasons that justified the City's affirma-

tive action plan in the *Chicago Fire Fighters* case also provided sufficient justification for believing that affirmative action was necessary. The court, however, vacated the district court's judgment and remanded the case for a determination whether the City's need for additional promotions in January 1987 was so pressing that it justified the immediate promotion of two minority plaintiffs who had scored below 70 on the 1979 captains examination. *Id.* at 74a-89a.

Judge Posner dissented from the panel's disposition of the equal protection claims in both cases. App., *infra,* at 79a-83a.

The court of appeals granted rehearing en banc in both cases.[6] By a 5-4 vote, the full court reversed the judgments of the district court in both cases, and remanded for further proceedings. Judge Posner's opinion for the majority (joined by Judges Coffey, Easterbrook, Manion, and Kanne) held that although the record showed that the City had discriminated against minorities "for at least a brief period of time after the date in 1972 on which Title VII of the Civil Rights Act of 1964 first became applicable to states and municipalities," App., *infra,* at 5a, the record did not warrant the conclusion that the challenged actions were necessary to rectify that discrimination.

The majority rejected the City's reliance on the consent decree in both cases, concluding that it "would not be a defense," since "[t]he plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination." App., *infra,* at 6a. As to the promotions challenged in the *Billish* case, the majority concluded (as had the panel) that the record was unclear whether the City could have waited until a new promotional list was available rather than making promotions out of rank order in January 1987 as

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[6] Judges Flaum and Rovner recused themselves from all proceedings on rehearing.

a remedy for the use of a stale all-white list. *Id.* at 7a-8a. As to the 25% minority promotional goal challenged in the *Chicago Fire Fighters* case, the majority rejected the City's reliance on the statistical evidence of a manifest racial imbalance between ranks in the Fire Department, because those statistics included "nonactionable" discrimination occurring prior to the effective date of Title VII. *Id.* at 11a. Considering the promotions from the 1987 engineers list, the majority concluded that there was insufficient justification to depart from rank order use of the list, since the promotional exam had been validated as job related. *Id.* at 9a-11a. Turning to the promotions to captain in October 1987, the majority concluded that the promotion of a Hispanic lieutenant out of rank order to satisfy the 5% promotional goal was suspect, because the new captains list used in strict rank order would have produced 4.7% Hispanic promotions; hence the record supported the inference that "the department was merely trying to curry favor with Hispanics by promoting a Hispanic out of rank order." *Id.* at 14a. The majority ordered the two cases consolidated in the district court for purposes of the proceedings on remand, and assigned to a single judge. *Id.*

Judge Ripple dissented, joined by Chief Judge Bauer and Judges Cummings and Cudahy, for the reasons stated in Judge Ripple's opinion for the panel's majority. App., *infra*, at 15a.

REASONS FOR GRANTING THE PETITION

We quite agree with Judge Posner's assessment, on behalf of a closely divided en banc court, that the questions presented by this case are "difficult and important." App., *infra*, at 2a. In three fundamental respects—the majority's treatment of consent decrees, statistical evidence, and numerical goals—the decision below is squarely inconsistent with the law in other circuits. The questions raised by this case have arisen repeatedly in

connection with the actions of numerous state and local governments around the country, and will undoubtedly continue to arise in the future. And the Seventh Circuit's resolution of these questions does far more than send this case to trial. By prohibiting the City from relying on the critical types of evidence by which an affirmative action plan can be justified under the law in other circuits, the en banc court largely eliminates the ability of state and local governments in this circuit to engage in meaningful affirmative action to redress prior discrimination. These "difficult and important" questions, resolved in a way so wholly at odds with the law anywhere else in this country, merit plenary review.

This Court has repeatedly held that, within carefully circumscribed limits, the Equal Protection Clause permits race-conscious affirmative action narrowly tailored to redress the effects of prior discrimination. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 509 (1989) (plurality opinion); *id.* at 518-19 (Kennedy, J., concurring in part and concurring in the judgment); *United States v. Paradise*, 480 U.S. 149, 166-71 (1987) (plurality opinion); *Local No. 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421, 480-81 (1986); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment). See also *Croson*, 488 U.S. at 511 n.1 (Stevens, J., concurring in part and concurring in the judgment). This "strict scrutiny" test, while demanding, is plainly possible to satisfy: utilizing that test this Court has twice upheld race-conscious hiring and promotional measures—in *Paradise* and *Sheet Metal Workers*—without a showing that the particular minority beneficiaries were themselves the victims of discrimination.

It is also clear from the Court's cases that an employer may have a constitutionally sufficient justification for engaging in affirmative action without a formal find-

ing or judgment that it has discriminated against minorities. In *Wygant*, seven Justices concluded that a public employer can adopt race-conscious remedial measures without such a finding as long as the employer has a sufficient basis to conclude that remedial action is necessary. See 476 U.S. at 274, 277-78 (plurality opinion); *id.* at 286, 290-92 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 305 (Marshall, J., dissenting). As Justice O'Connor wrote, "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Id.* at 289. In *Croson*, a plurality reiterated that a constitutionally sufficient basis for affirmative action is present as long as a municipality has a "strong basis in evidence for its conclusion that affirmative action was necessary." 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277) (plurality opinion). Since *Croson* at least five circuits have adopted the "strong basis in evidence" test for evaluating the propriety of race-conscious affirmative action.[7]

The record in this case details a long history of discriminatory hiring and promotional practices in the Chicago Fire Department that had left its upper ranks vastly unrepresentative not only of the Chicago workforce, but also of the ranks eligible for promotion. The Constitution permitted the City, in an effort to remedy its prior discrimination, to do more than merely discontinue its discriminatory practices, since that would leave in place

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[7] See *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992); *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1413-14 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458-59 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992).

promotional ranks filled with nonminorities hired and promoted under a discriminatory system—"a departmental hierarchy dominated by nonminorities." *Paradise*, 480 U.S. at 168 (plurality opinion). And, in any event, by 1987, it had become clear that mere discontinuance of the prior discriminatory practices would not remedy the effects of discrimination in the Fire Department's upper ranks. Because minorities had entered the Department in significant numbers only recently, and new firefighters are promoted into the upper ranks only gradually, the composition of the upper ranks would remain tainted by the effects of discrimination for a generation—until most high ranking personnel retired and were replaced by personnel hired and promoted after the Department had stopped discriminating against minorities. Thus, merely discontinuing its discriminatory practices and using the promotional lists in strict rank order would have failed to enable the City to make meaningful progress toward redressing prior discrimination.

The City therefore undertook affirmative steps to bring qualified minorities into the upper ranks of the Fire Department, in order to redress their prior exclusion. Under this Court's cases and the law of other circuits, this affirmative action was lawful. The Seventh Circuit's holdings that the Constitution forbids consideration of the consent decree and statistical evidence, and that the use of even a narrowly tailored promotional goal can be second-guessed by a jury, are at odds with precedents of this Court, and flatly inconsistent with the law in other circuits.

1. The first type of evidence on which the City relied, in seeking to establish its "strong basis in evidence" for its conclusion that affirmative action was necessary, was the consent decree between the City and the United States, as well as the history of the litigation leading to the entry of that decree. The consent decree recognizes that the effects of the City's prior discrimination on the

composition of the upper ranks of the Fire Department would not be quickly undone; for this reason, the decree contains a "long range goal," requiring the City "to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made."

The racial composition of the Department in 1987 all too plainly showed that the composition of its upper ranks remained tainted by discrimination; the City had not come close to achieving the long-range goal mandated in the consent decree. And as a matter of pure mathematics, if the City had used the promotional lists in strict rank order, it would have made no progress toward this goal. Thus the City concluded that the consent decree required it to engage in affirmative action.

The en banc majority held that the consent decree was wholly irrelevant to the City's permissible justifications for affirmative action; reliance on the decree would simply "not be a defense." App., *infra*, at 6a. This is because "[t]he plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989) . . . ." App., *infra*, at 6a. The majority added that it doubted the constitutionality of the decree, since it "was entered before the *Croson* decision made clear that reverse discrimination is subject to strict scrutiny." *Id.* at 6a-7a.

The holding below—that the existence of a consent decree requiring race-conscious conduct is irrelevant in evaluating the justification for such conduct when subsequently undertaken—is squarely inconsistent with the law in at least two other circuits, which have upheld race-conscious promotions based in part on the existence of a consent decree to which the plaintiffs were not par-

ties. See *Stuart v. Roache*, 951 F.2d 446, 450-53 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1456-61 (8th Cir. 1991), cert. denied, 112 S. Ct. 938 (1992).[8] In *Donaghy*, the Eighth Circuit addressed this point at some length:

> Unlike a voluntary affirmative action plan, a consent decree is subject to court approval before it can take effect, is often approved only after a fairness hearing, and commonly remains under a court's jurisdiction for a number of years. Because a federal court is not just a "recorder of contracts," but "an organ of government constituted to make judicial decisions," a consent decree must meet three requirements. First, it must "spring from and serve to resolve a dispute within the court's subject matter jurisdiction;" second, it must "come within the general scope of the case made by the pleadings;" and third, it must "further the objectives of the law upon which the complaint was based." While the entry of an affirmative action consent decree does not guarantee that the plan serves a remedial purpose or is narrowly tailored, the heightened judicial oversight in a properly entered decree helps obtain that end.
>
> Accordingly, this court has recognized that when an employer is called upon to show a remedial purpose, the employer can meet its burden by producing evidence "that the employer implemented its plan . . . in adherence to a court order, whether entered by consent or after litigation." As with a voluntary affirmative action plan, an employer subject to a consent decree must also demonstrate that the plan was a response to a conspicuous racial imbalance in its workforce, and that the plan is sufficiently narrowly tailored to the remedial purpose.

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[8] See also *Jansen v. City of Cincinnati*, 977 F.2d 238, 242-44 (6th Cir. 1992), cert. denied, No. 92-1555 (May 17, 1993); *Vogel v. City of Cincinnati*, 959 F.2d 594, 599-600 (6th Cir. 1992).

Id. at 1459 (citations omitted) (quoting *Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (plurality opinion), and *Setser v. Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064 (1981)). In *Donaghy*, the court concluded that a consent decree justifies race-conscious affirmative action when "(1) that decree's purpose was remedial and a response to racial imbalance, and (2) . . . the plan was narrowly tailored." *Id.* In contrast, here the Seventh Circuit held that the decree was simply irrelevant, even when, as we explain above, the decree was the result of an overwhelming case brought by the United States, was entered in the face of a statistically significant imbalance in the racial composition of the Fire Department, and contained a long-range goal narrowly tailored to the composition of the ranks eligible for promotion.[9]

The en banc majority articulated three reasons for rejecting the City's reliance on the consent decree, but they all are without merit. First, the majority noted that the plaintiffs here were not parties to the consent decree and cited *Martin v. Wilks*. That case, however, held only that a nonminority who is not a party to litigation that pro-

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[9] As the dissenting judges below explained, the racial imbalance in the Fire Department's workforce, both at the time the decree was entered and at the time the affirmative action plan at issue was adopted, was of undeniable statistical significance. App., *infra*, at 42a-44a. Statistical variations of this magnitude are plainly an appropriate basis for affirmative action. Compare *Officers For Justice v. Civil Service Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993); *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 450-52; *Associated General Contractors*, 950 F.2d at 1414-15; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir. 1990), cert. denied, 111 S. Ct. 516 (1991), and *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990); with *Maryland Troopers Ass'n, Inc. v. Evans*, 1993 WL 143741 (4th Cir. May 6, 1993), and *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1010-11 (6th Cir. 1992).

duces a consent decree cannot be bound by the decree; the Court did not hold that the decree is of no significance in evaluating a public employer's justification for undertaking affirmative action. The Eighth Circuit made this very point in *Donaghy,* in the course of rejecting Donaghy's reliance on *Martin v. Wilks.* See 933 F.2d at 1456-58. Second, the majority noted that the consent decree contains no finding that the City had discriminated against minorities. But, as we explain above, *Wygant* settled that no prior finding of discrimination is needed for an employer to engage in affirmative action. In fact, four circuits have squarely held that the absence of a finding of prior discrimination does not bar consideration of that prior discrimination as a justification for affirmative action. See *Stuart,* 951 F.2d at 453; *Donaghy,* 933 F.2d at 1460; *Howard v. McLucas,* 871 F.2d 1000, 1008 (11th Cir.), cert. denied, 493 U.S. 1002 (1989); *Kirkland v. New York State Department of Correctional Services,* 711 F.2d 1117, 1131 n.16 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. City of Alexandria,* 614 F.2d 1358, 1365 n.15 (5th Cir. 1980). Third, the majority noted that the decree predated the adoption of the strict scrutiny test in *Croson.* That observation, however, is irrelevant, since, as we explain above, this Court has held that the strict scrutiny test permits race conscious affirmative action. It is therefore not surprising that, since *Croson,* four circuits have upheld consent decrees requiring race-conscious hiring or promotional policies when narrowly tailored to redress discrimination. See *Vogel v. City of Cincinnati,* 959 F.2d 594, 599-600 (6th Cir. 1992); *Stuart,* 951 F.2d at 453-55; *Donaghy,* 933 F.2d at 1459-61; *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1446-48 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990). The strict scrutiny test is simply not a bar to this type of consent decree.

Not only is the majority's holding at odds with *Stuart* and *Donaghy,* but, as a practical matter, it makes it nearly

impossible for public employers to comply with their obligations under consent decrees. Under the majority's holding, a public employer assessing whether it has a constitutionally sufficient basis to engage in race-conscious affirmative action may not consider the fact that it is under a consent decree obligating it to do just that. The majority has effectively required employers to disregard the binding legal obligations of a consent decree when making personnel decisions; to the extent that an employer relies on a consent decree in making personnel decisions, it has, in the majority's view, utilized a constitutionally forbidden criterion. Here the City was under a legal obligation, on pain of contempt, to make race-conscious promotional decisions, yet the court of appeals has held that the City may not constitutionally consider this fact when deciding how to promote. And while the ruling below is technically interlocutory, as a practical matter it is final—no panel of the Seventh Circuit, even in a subsequent appeal in this case after a trial, will be free to reexamine this decision of the en banc court. The decision below will remain the law of the Seventh Circuit until this Court examines the questions we now present. Moreover, as an en banc decision of an influential court, the majority's ruling will be cited throughout the country, infecting other circuits with the same uncertainty public employers in the Seventh Circuit now face in this unquestionably important area of the law.

The United States has entered a large number of consent decrees throughout the country with public employers requiring them to make race-conscious hiring or promotional decisions.[10] Under the decision below, these de-

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[10] In a brief filed in this Court in *Local No. 93, International Association of Firefighters v. City of Cleveland*, No. 84-1999, the National League of Cities advised the Court, based in part on materials obtained from the Department of Justice under the Freedom of Information Act, that it was aware of at least 69 employment discrimination suits against state and local governments,

crees will become unworkable: it will be difficult, to say the least, to comply with both consent decrees and the Constitution, if public employers must ignore their obligations under consent decrees when making decisions about how to redress prior discrimination that can withstand equal protection attack.[11] Moreover, the decision below gives no weight to the unquestionably legitimate interest in ensuring that public employers achieve "compliance with the judgments of federal courts." *Paradise*, 480 U.S. at 170 (plurality opinion) (quoting *Sheet Metal Workers'*, 478 U.S. at 485 (Powell, J., concurring in part and concurring in the judgment)). For this reason alone, the decision below merits plenary review.

2. In undertaking the affirmative action at issue in this case, the City also relied on statistical evidence of the manifest racial imbalance between the ranks of the Fire Department, establishing that the effects of the Department's prior discrimination had not yet dissipated. In *Croson* itself, the Court observed that a statistically significant racial disparity between the pool of those eligible for, and those who receive, governmental benefits gives rise to an inference of prior discrimination, and hence justifies remedial action. See 488 U.S. at 501-03; see also *id.* at 509 (plurality opinon); *Wygant*, 476 U.S. at

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either brought by or intervened in by the Department, that required affirmative action in the form of specific minority hiring and promotion goals and timetables, as part of the relief awarded. See Brief of the National League of Cities, et al., as amici curiae, at 1 n.1.

[11] The Civil Rights Act of 1991 now binds nonparties to consent decrees if they had actual notice of the decree and a reasonable opportunity to be heard before it was entered. Pub. L. No. 102-166, § 108, 105 Stat. 1076 (1991). This provision, however, will be of little assistance to public employers as to the vast majority of consent decrees that call for affirmative action, because, as here, the procedural steps required by the Act for affording a decree preclusive effect were not followed when these decrees were entered.

274-75 (plurality opinion); *id.* at 292 (O'Connor, J., concurring in part and concurring in the judgment). Since *Croson*, at least six circuits have held that this type of statistical evidence is sufficient to justify race-conscious affirmative action. See *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 450-52; *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414-15 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992); *Coral Construction Co. v. King County*, 941 F.2d 910, 918-19 (9th Cir. 1991), cert. denied, 112 S. Ct. 875 (1992); *Donaghy*, 933 F.2d at 1459-60; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir.), cert. denied, 111 S. Ct. 516 (1991).

The dissenting judges below concluded that the City had properly relied on statistical evidence, App., *infra*, at 41a-46a. The majority, however, rejected this evidence, concluding that the statistics were tainted by "*non-actionable* discrimination," *id.* at 11a (emphasis in original), namely, discriminatory hiring and promotions prior to 1972, when Title VII of the Civil Rights Act became applicable to the City. *Id.* at 12a-13a. The majority acknowledged that the City likely violated Title VII "under a 'disparate impact' theory of discrimination," *id.* at 5a, for at least some period of time after 1972, and acknowledged also that an imbalance between the racial composition of the ranks of engineer and captain and the pools eligible for promotion to those ranks persisted at the time the City undertook the affirmative action at issue. The majority believed, however, that that disparity was largely created by the City's pre-1972 practices. *Id.* at 12a-13a. The majority also recognized the possibility that the City had engaged in intentional discrimination in favor of whites before 1972, in violation of the Equal Protection Clause. *Id.* at 13a. But the majority concluded: "of this there is no evidence." The majority added that the City could not constitutionally endeavor to redress "nonactionable discrimination," since "it is difficult to see how discrimination aimed at remedying

conduct lawful when engaged in (that is, before 1972) could be thought remedial in the relevant sense and survive strict scrutiny; the Court's dicta [in *Croson*] suggest it could not." *Id.* Thus, the majority rejected the City's statistical evidence in its entirety—rather than merely concluding that it raised an issue for trial—by holding that only evidence of "actionable discrimination" will do, and that the proffered statistics were "no evidence" of unconstitutional pre-1972 discrimination.

No other circuit has ever drawn a distinction between pre- and post-Title VII statistical evidence, and with good reason—no violation of Title VII is necessary to justify affirmative action. Such remedial efforts can be addressed to constitutional violations as well. Although this Court has held that only intentional discrimination violates the Equal Protection Clause, see *Washington v. Davis,* 426 U.S. 229 (1976), that does not mean that statistical evidence showing a pattern of excluding minorities from public employment is irrelevant to the determination whether intentional discrimination has occurred, a point made by *Washington v. Davis* itself, see *id.* at 241-42, 246. Subsequently, the Court has made clear that statistical evidence that minorities are not hired or promoted in proportion to their representation in the qualified labor pool is a powerful indication of intentional discrimination against minorities. See *Hazelwood School District v. United States,* 433 U.S. 299, 307-08 (1977); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-38 (1977).

In the context of affirmative action, where, as we explain above, no prior finding of discrimination is required, but rather only a "strong basis in evidence" to conclude that remedial action is warranted, statistics are even more critical. Dicta in *Croson* itself make clear that statistical evidence is not limited to disparate impact cases under Title VII; *Croson* was a case involving municipal purchasing practices, to which Title VII does not apply, and

where only intentional discrimination is forbidden.[12] Nevertheless, in *Croson* the Court recognized that statistical evidence of a manifest racial imbalance alone could justify affirmative action: "There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.' " 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. at 307-08).

The decisions in other circuits concerning affirmative action in state and local purchasing programs amply illustrate the importance of statistical evidence even when Title VII is inapplicable. The Ninth Circuit, in the *Associated General Contractors* case, and the Eleventh Circuit, in the *Cone* case, squarely held that statistical evidence can establish prior discrimination, thereby providing a constitutionally sufficient justification for race-conscious affirmative action in purchasing programs, despite the inapplicability of Title VII and its disparate impact theory of discrimination. And in *Coral Construction*, another purchasing case, the Ninth Circuit wrote that "statistical evidence is an invaluable tool with which to evaluate an affirmative action program." 941 F.2d at 918. Thus the Seventh Circuit's rejection of statistical evidence allegedly tainted by conduct to which Title VII does not apply is at odds with the law in other circuits.

While the Seventh Circuit's ruling, as we note above, is technically interlocutory, its importance is undeniable. As a ruling of the en banc court, this decision will govern the use of statistical evidence not only through the balance of this case, but also in all subsequent cases in the Seventh Circuit, and likely cases in other circuits as well.

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[12] While 42 U.S.C. § 1981 arguably applies to discrimination in municipal purchasing, that section, "like the Equal Protection Clause, can be violated only by purposeful discrimination." *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

And the importance of statistical evidence in affirmative action cases is just as clear. Because the careers of non-minorities hired or promoted under pre-1972 discriminatory practices commonly last decades, the ranks of public agencies, particularly at the upper echelons, will remain artificially white for decades as well, unless public employers are able to take reasonable steps to redress pre-1972 discrimination. The majority's holding is even more important for activities to which Title VII does not apply —such as municipal contracting—since the majority evidently views statistics as "no evidence" of unconstitutional discrimination, and has further concluded that the strict scrutiny test forbids any effort to redress "nonactionable" discrimination. And if state and local governments may not consider statistical evidence when evaluating whether they have engaged in prior unconstitutional discrimination, an important window to the truth will be closed to them. Without such evidence, the testimony of former officials will likely be the only other source of evidence shedding light on whether there was prior unconstitutional discrimination. Of course, the likelihood that former officials will be willing to admit that they intentionally discriminated against minorities is remote, to say the least. Yet by leaving the permissibility of affirmative action largely to the candor of former officials, the majority below has ironically left the question whether state and local governments may redress prior discrimination in the hands of those most likely to be responsible for that discrimination.

3. The Seventh Circuit has also parted company with other circuits in its treatment of the propriety of promotional goals for minorities in this case. The affirmative action at issue here consists of the City's departure from strict rank order use of its promotional lists. The majority below concluded, however, that because the 1987 engineers list was developed from an examination that was content-valid (testing for skills required of successful can-

didates), there was insufficient justification to depart from its rank order use, even if rank order use would have an adverse impact on minorities. App., *infra,* at 9a-11a. And with respect to the 5% promotional goal for Hispanic captains from the 1987 list, the majority concluded that since the list as a whole contained 4.7% Hispanics, the departure from rank order to ensure that the October 1987 promotions met the goal raised an issue of fact about whether "the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order." *Id.* at 14a.

In this case, as we explain above, the only expert testimony in the record established that the small differences in scores among candidates near the top of the promotional lists could not be validated as job-related, and that strict rank order use of promotional lists would have made no progress toward redressing the conspicuous racial imbalance in the Fire Department. In fact, rank order use of the 1987 engineers list would have had a substantial adverse impact on minorities. Nevertheless, the majority below held that because the promotional examinations were content valid, the lists they produced had to be used in rank order regardless of whether strict rank order use could also be validated.

This conclusion is inconsistent with the law in two other circuits. Even a valid test, when administered to many candidates, may result in closely clustered scores, and the small differences in scores that determine a candidate's position on a promotional list often reflect no demonstrable difference in qualifications. The Second and Ninth Circuits have upheld departures from strict rank order use of content-valid promotional examinations when rank order use of the lists would have an adverse impact on minorities, and the small differences in scores could not be shown to be job-related. See *Officers For Justice v. Civil Service Commission,* 979 F.2d 721, 727-28 (9th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993); *Bridge-*

port Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1144-49 (2d Cir.), cert. denied, 112 S. Ct. 337 (1991). This result is also dictated by the *Uniform Guidelines on Employee Selection Procedures*, which provide that if two selection procedures are equally job-related, an employer is obligated to select the one with less adverse impact on minorities. 29 C.F.R. § 1607.3(B) (1991); see *Officers For Justice*, 979 F.2d at 728.

Moreover, at least three other circuits have also held that the use of a hiring or promotional goal favoring minority candidates who have qualifications not significantly different from nonminority candidates is a narrowly tailored remedy for prior discrimination. See *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 453-55; *Donaghy*, 933 F.2d at 1459-61. Yet here, based on nothing more than a departure from rank order use of a promotional list—itself intended to comply with a promotional goal tied closely to the composition of the pool eligible for promotion—the majority invited the trier of fact to conclude that the City utilized its promotional goals to curry political favor rather than to redress prior discrimination. Thus the majority's treatment of promotional goals creates yet another split in the circuits. This one is of great importance to both public and private employers, given the frequency with which they must decide wether to use hiring or promotional lists in strict rank order.

4. The cumulative effect of the holdings of the en banc majority makes the impact of this case even greater than the sum of its parts because it so tightly circumscribes the ability of state and local governments to redress prior discrimination.

The majority's holding creates great uncertainty about whether state and local governments can comply with the large number of consent decrees that the United States has obtained as part of its efforts to identify and redress discrimination. While most of these decrees, like the one at issue here, explicitly call for race-conscious policies as

a remedy for prior discrimination, the Seventh Circuit's decision requires public employers to construct personnel policies without reference to their obligations under consent decrees. And the use of statistical evidence is forbidden unless it relates solely to post-1972 conduct, although at the upper ranks of government, most incumbents were hired or promoted before then. What is more, statistical evidence is entirely forbidden when considering affirmative action in activities not governed by Title VII. And a plaintiff can apparently raise a genuine issue of fact, entitling him to a trial, whenever an employer departs from strict rank order use of a hiring or promotional examination, because that alone raises an inference of favoritism.

This last point is perhaps most significant. If all affirmative action cases are to be tried, state and local governments can have no confidence, even if they adopt affirmative action programs based on reasonably clear evidence of prior discrimination, that they will not face a serious risk of large backpay and other awards in favor of a nonminority plaintiff. Under the decision below, any affirmative action policy, no matter how strong the documentary justification for it may be, is subject to being second-guessed by a jury. And at trial, the only type of evidence the Seventh Circuit has not disparaged is an admission of intentional discrimination; but even then the trier of fact is free to brand any non-rank order use of employment tests as a pretext to curry political favor.

Perhaps no question has more occupied this Court in the last half-century than how to identify and redress discrimination against racial and ethnic minorities. This case presents questions of critical importance to that process. The Court's plenary review of the decision below is accordingly amply warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 28, 1993

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1650

EARL BILLISH, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

No. 90-2182

CHICAGO FIRE FIGHTERS UNION, *et al.*,
Plaintiffs-Appellants,

v.

RICHARD M. DALEY, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 87 C 8731, 87 C 7295—James B. Zagel
and James F. Holderman, *Judges*

ARGUED DECEMBER 7, 1990—DECIDED MAY 4, 1992
REARGUED EN BANC DECEMBER 15, 1992—
DECIDED MARCH 29, 1993

Before BAUER, *Chief Judge*, and CUMMINGS, CUDAHY, POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. We granted rehearing en banc to examine the following difficult and important question: In what circumstances can admitted racial discrimination, challenged as a violation of the equal protection clause because committed by an organ of state government, be upheld as a proper remedial measure when there has been no trial to determine whether the discrimination can survive "strict scrutiny"? For that is the constitutional standard applicable to discrimination against as well as in favor of whites. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). A divided panel of this court upheld the district court's grant of summary judgment for the defendants in one of two cases that had been consolidated for appeal, *Billish v. City of Chicago*, No. 90-1650, but reversed it in the other, *Chicago Fire Fighters Union v. Daley*, No. 90-2182, on the ground that the district judge (a different one) had failed to apply the standard of strict scrutiny to the defendants' conduct. 962 F.2d 1269 (7th Cir. 1992). Because the district court decided the cases on summary judgment, we can affirm only if, had the record before the district court in the two cases been the record of a complete trial, the defendants would have been entitled to a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 (1986); *Cygnar v. City of Chicago*, 865 F.2d 827, 834 (7th Cir. 1989).

The cases are so similar that we can treat them as if they were one. Both involve challenges to racial favoritism in promotions within the uniformed ranks of the

Chicago Fire Department. The ranks are firefighter, engineer, lieutenant, captain, and battalion chief, but the last is not in issue. Promotions are made on the basis of competitive examination. Eligibility to sit for an examination is limited to persons in the rank below, except that a firefighter may, if he wants, sit for the lieutenant's examination, and be promoted to lieutenant, without spending any time as an engineer. The record is silent on whether there is some minimum amount of time that one must spend in one's present rank before being eligible for promotion; but as examinations for promotion are not given every year, there would be delays in promotion even if there were no required waiting periods. After an examination is administered and graded, the candidates are ranked from first to last on the basis of their grades and are placed in rank order on an eligibility list from which promotions to the next rank are made. All listed persons whose grades are above a cut-off point deemed to mark minimum eligibility—all, in short, who have a passing grade on the examination—are eligible for promotion to the next rank.

In 1986 the fire commissioner, defendant Galante, promoted eighteen lieutenants to captain on the basis of their rank order in a captains' eligibility list that had been compiled in 1979, the last time the captains' exam had been given. All the promoted lieutenants were white. Only two members of recognized minorities (blacks and Hispanics, so far as relevant to this case) were left on the list, and their scores on the captains' exam were well below the cut-off point. The commissioner asked the personnel department to lower the cut-off point, and it did. He then, early in 1987, promoted the two minority candidates to captain out of rank order. The plaintiffs in the *Billish* case are white lieutenants who had scores above the (old) cut-off point on the 1979 list and were passed over when the two minority lieutenants were promoted over them. They also complain because, the list

having become all-white after the minority lieutenants were promoted to captain, the commissioner refused to make further promotions from the list, deciding instead to await the compilation of a new list based on a new exam.

In 1987 new eligibility lists were compiled to guide promotion from firefighter to engineer and from lieutenant to captain. These lists were based on examinations administered between 1985 and 1987; part of the engineer's exam was "race normed" to improve the scores of the blacks and Hispanics who took it. From these lists Commissioner Galante in 1987 ordered the promotion of 56 firefighters to engineer and 24 lieutenants to captain. The first 48 promotions to engineer were made in rank order and included 9 minority candidates; the last 8 promotions were of black firefighters taken out of rank order. The first 23 promotions to captain were made in rank order and included 5 blacks (no Hispanics); for the twenty-fourth, the commissioner reached down for a Hispanic and promoted him out of rank order. The departures from rank order were in conformity with a 25 percent goal, established by the Washington administration, for minority promotions in the fire department. The plaintiffs in the *Chicago Fire Fighters* case are the whites passed over for promotion to engineer or captain as a result of the promotion of nonwhites out of rank order in the 1987 eligibility lists.

The blacks and Hispanics promoted out of rank order to the detriment of the promotional opportunities of the plaintiffs in these two cases were promoted because of their race or ethnicity. The equal protection clause forbids states to give preference to persons on the basis of their race (or ethnicity, but this needn't be discussed separately), even if theirs is not the white race. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 493; *United States v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989). To that extent the Constitution is truly colorblind.

The Supreme Court has, however, carved an exception for the case in which discrimination against whites is necessary to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 509; *Wygant v. Jackson Board of Education,* 476 U.S. 267, 280 (1986) (plurality opinion); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991). We must decide whether the defendants have so far succeeded in bringing themselves within the exception that no reasonable trier of fact could doubt that the discriminatory promotions described above were appropriate remedial measures; only then would the defendants be entitled to summary judgment, foreclosing the plaintiffs' right to a trial. Since a discriminatory remedy, to pass constitutional muster, must discriminate no more than is necessary to rectify the discrimination for which it is the remedy, *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 505-08; see also *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 274 (plurality opinion), we must consider not only whether the Chicago Fire Department ever discriminated unlawfully in favor of whites but also whether, if so, the curative measures taken in these two cases have been carefully designed to avoid unnecessary injury to white persons.

Although there has never been a formal judicial determination that the Chicago Fire Department ever discriminated in favor of whites, we do not understand the plaintiffs to deny that, for at least a brief period of time after the date in 1972 on which Title VII of the Civil Rights Act of 1964 first became applicable to states and municipalities, the department was in violation of that statute under a "disparate impact" theory of discrimination. The fact that when the city first came under the Act the percentage of blacks and Hispanics in the uniformed ranks of the fire department—5 percent—was far lower than

their percentage in the relevant labor market would not of course have established a violation, *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977), but the city appears to have violated the Act by not changing, when the Act became applicable to the city, the hiring practices responsible for this disparity, or showing that they were essential to the department's efficient operation. *Id.* at 309 n. 15. The objectionable hiring practices were, however, eliminated by a consent decree entered in 1974 in a suit against the city brought by the Department of Justice. Promotions were the subject of a separate consent decree, entered in 1980 in another suit by the Justice Department against the city. This decree required the fire department to compile new eligibility lists on the basis of new tests properly validated as fair to minorities, and in promoting from the old lists to engineer or lieutenant to promote one black or Hispanic for every four whites who were promoted.

Assuming, then, that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980, we come to the question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination. Even if the measures had been required by the consent decree, which they were not—the decree contained no captain's quota at all, and the quotas for engineers and lieutenants were only 20 percent and are thus exceeded by the measures challenged here—this would not be a defense. The plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989); *United States v. City of Chicago*, 978 F.2d 325, 330 (7th Cir. 1992); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1337 (7th Cir. 1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1456-58 (8th Cir. 1991). The decree moreover was entered before the *Croson* decision made clear that reverse

discrimination is subject to strict scrutiny. The civil rights amendments enacted in 1991 forbid challenges to civil rights consent decrees by persons having "actual notice" of the decree and a "reasonable opportunity to present objections" to it, 42 U.S.C. § 2000e-2(n)(1)(B)(i), but the city does not argue either that the provision applies to this case or that, if it did, it would bar these suits.

We have three sets of promotions to consider. The first, of 20 lieutenants to captain, was from an old eligibility list—that is, an eligibility list based on an examination given before the 1980 consent decree: the 1979 list of lieutenants who had taken the then most recent captain's test. The second set of promotions was of the 56 firefighters promoted to the rank of engineer on the basis of an examination given in 1985. The third set consisted of the 24 lieutenants promoted to captain on the basis of a two-part examination given in 1986 and 1987.

The city's strongest case for legitimate remedial discrimination involves the promotion of the two minority lieutenants to captain in January 1987. At the time, the only eligibility list for captain had been compiled in 1979 on the basis of an examination that had not been validated for racial neutrality. Neither of the two minority lieutenants on that list had scores above the cut-off point. The commissioner had just ordered the promotion of eighteen lieutenants from the list—all white. Only 4 percent of the captains in the Chicago Fire Department at the time were nonwhite, while 29 percent of the firefighters (the lowest rank) were. By reaching down to the two minority lieutenants who were below the cut-off point, the commissioner caused 10 percent of the promotions to captain to be of nonwhites, and this was a percentage much lower than that of nonwhites in any of the lower ranks.

Yet at the time the commissioner acted, it was plain that the compilation of a new eligibility list, one based on examinations designed under the aegis of the consent decree and therefore presumptively unbiased, was only

months away, for the department had already administered the first half of a new captains' test. And in fact by October 1987 the new eligibility list had been compiled and new promotions made from it. It is not argued that the department had a desperate need for two more captains in January, that it couldn't wait till October. It seems that, distressed by the all-white composition of the group of captains appointed in the latest round of promotions, Commissioner Galante decided to appoint possibly unqualified blacks without waiting to see how blacks would perform on a race-neutral examination. If that is what happened—a question for trial—it would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that *Cronson* requests. It should be unnecessary to add that a public employer cannot be allowed to justify reverse discrimination by the bootstrap method of an alternating sequence of racial promotions (or hires). That is, the city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list.

Of course if the city had a desperate need for twenty captains just then, and the only eligibility list it had was based on a quite possibly biased examination that had been given in 1979, a modest departure in favor of remedial racial balance might well be justified. When the new captains' examination was finally administered, 21 percent of the lieutenants promoted to captain on a strict rank-order basis with no racial favoritism were black, which is more than twice the percentage under the old list even after Commissioner Galante promoted the two black lieutenants out of rank order. But the record does not reveal whether the city had an urgent need for twenty captains and thus could not await the administering and scoring of an unbiased exam.

If on remand the promotion of the two black lieutenants out of rank order does not survive strict scrutiny, it does not follow that the *Billish* plaintiffs will win. They have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites. They will have to show that if promotions had been delayed until the 1987 list was available, and made from that list, they would have been promoted sooner than they were.

The engineer examination administered in 1985 was devised by the city, of which Harold Washington, a black, was now the mayor, with the aid of an academic expert; in consultation with the Justice Department, which had brought the suit concluded by the consent decree entered in 1980; and in apparent or at least intended conformity with the EEOC's guidelines for "content validation" of employment tests. 29 C.F.R. § 1607.5. Moreover, the examination was approved by the district court. The first part of the examination was a written test. The ratio of the minority pass rate to the white pass rate was less than the 80 percent benchmark that the EEOC and other federal agencies use to decide whether an employment test has a racially adverse impact. So the city raised the minority candidates' scores sufficiently to increase the ratio to 84 percent. Candidates could sit for the second half of the examination, a "hands on" practical test (operating a fire-engine simulator), only if they passed the written test, the scores on which, as we just noted, had been adjusted to minimize the adverse impact on blacks and Hispanics. The practical test did not require a racial adjustment, because on it the ratio of the minority to the white pass rate was 87 percent. Rank order on the eligibility list for promotion to engineer was based on performance on the practical test, weighted 10 percent by seniority.

Had the department stuck to rank order, 10 of the 56 firefighters promoted to engineer would have been black

or Hispanic, which is 18 percent, very near the quota set by the consent decree. Instead, by promoting 8 more nonwhites, taken out of rank order, the department raised this percentage to 30 percent. Yet not only had the examination been approved by the parties to the consent decree—by the Justice Department, which had originally challenged the fire department's promotion procedures as unlawfully discriminatory in favor of whites, and by the City of Chicago, which under the Washington administration could hardly be thought insensitive to the interests of minority groups. *Auriemma v. Rice,* 910 F.2d 1449, 1451 (7th Cir. 1990) (en banc); *Cygnar v. City of Chicago,* 865 F.2d 827, 835 (7th Cir. 1989); *United States v. City of Chicago,* 870 F.2d 1256, 1257-58 (7th Cir. 1989); *United States v. City of Chicago,* 894 F.2d 943, 949 (7th Cir. 1990) (concurring opinion). In addition, the scores on the examination had been altered to improve the performance of nonwhites—the practice of "race norming" now forbidden by federal law. 42 U.S.C. § 2000e-2(*l*). In these circumstances, the departures from rank order could not be justified—at least with the certitude required to head off a trial—on the ground that the order had been based on a discriminatory test.

The city has, it is true, presented evidence that the test which it devised was subtly, unconsciously, biased in favor of whites, after all. The evaluation of that evidence is a matter for trial. That the city was determined to achieve or exceed its new goal of 25 percent minority promotions, regardless of what *any* test showed, is suggested by its insistence that "content validation" is not an adequate method of validating an employment test. To validate a test for content means to establish that it tests for skills or knowledge used on the job: a typing test for secretaries, for example. The city designed the engineers' test as one that would be content validated, as distinct from a "criterion validated" test, which tests qualities predictive of or correlated with job performance (such as IQ). The

law is clear that either method of validation is proper. *Gillespie v. Wisconsin,* 771 F.2d 1035, 1040-41 (7th Cir. 1985); 29 C.F.R. § 1607.5(A). Now the city has backtracked, claiming that content validation is no good, and even suggesting that the fact that whites do better than others on a test proves that the test is biased even if it has been validated. Again, the law is to the contrary. "There is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor." *United States v. City of Chicago, supra,* 870 F.2d at 1261; see also *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 503. The city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination by departing from rank order fixed by nonbiased tests. It will require a trial to determine whether this is in fact the city's motive in repudiating its own test.

The city argues that the disparity between the percentage of minority firefighters (29) and the percentage of minority engineers (11) justified heroic efforts, even ones that might require disregarding the results of a perfectly fair test, to advance minority firefighters by way of remedy for previous discrimination in favor of whites. The disparity by itself proves little, and this for two reasons. First—a point explained next—the much larger percentage of entry-level blacks and Hispanics may reflect *nonactionable* discrimination in years past. Second, the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree. If, to take an example closer to home, law schools through their affirmative-action programs increased the percentage of minority law students to 10 percent, the fact that law school faculties were on average only 2 percent black would not be evidence of discrimination in appointments to faculty positions. The larger

fraction of minority students would be an artifact of the law schools' having lowered their admission standards and not a true measure of the pool from which faculty would be recruited.

We come to the last set of promotions. Had the city promoted lieutenants to the rank of captain on the basis of the 1987 captains' eligibility list strictly on the basis of rank order, 5 out of the 24 promotions, or 21 percent, would have been of minority candidates—all as it happened black. Apparently distressed that none of the successful candidates was Hispanic, the fire commissioner promoted a Hispanic lieutenant to captain out of rank order. The result was to increase the minority representation in the promotions from 21 to 25 percent. The city points to the very small percentage of minority captains in 1987—only 4 percent—and asks us to infer that this must have been a legacy of discrimination. Although the record contains no evidence on the required or average waiting period in one rank before promotion to the next, it is common sense that working one's way up the ladder to the fire department's second-highest rank may well take many years. Hence a consequence of the very low hiring of minority firefighters before 1974 may have been that in the middle 1980s only a tiny fraction of captains consisted of blacks and Hispanics. From this it can be argued that racial discrimination in their favor was necessary to bring the percentage of captains from these groups nearer to where it would have been but for the discrimination that the groups had experienced many years earlier.

This of course is possible, but has not been shown, and in fact is unlikely. Recall that, so far as appears, the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that the discrimination was rectified in 1974. That the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between

1972 and 1974 is implausible. Of course it is possible that the city had been violating the Constitution, and not just the standards of Title VII not yet applicable to it, before 1972, by engaging in intentional discrimination in favor of whites. But of this there is no evidence. And it is difficult to see how discrimination aimed at remedying conduct lawful when engaged in (that is, before 1972) could be thought remedial in the relevant sense and survive strict scrutiny; the Court's dicta suggest it could not. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 500; *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 289 (O'Connor, J., concurring); *Regents of University of California v. Bakke,* 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

Another possibility is that minority captains were so few in the mid-1980s not because there were so few minority hires before 1974 but because of discriminatory promotional policies not rectified until the 1980 consent decree—indeed not until later, since promotions based on validated captains' tests were not made until 1987. That is another issue requiring further exploration.

Even disregarding these points, we note that, by 1987, 14 percent of the lieutenants in the fire department were black or Hispanic, and with a higher percentage of black and Hispanic lieutenants than this—21 percent—being promoted to captain without any "race norming" or other discrimination in their favor on the captain's examination, there would in all likelihood soon have been a large percentage of minority captains even if promotions were made on a colorblind basis. The question becomes whether accelerating the process by departing from colorblind procedures was justifiable as a means for rectifying the discrimination in which the department may have engaged in the 1970s. Perhaps so, but an alternative possibility—supported by the testimony of the city's own expert that rank-order promotion from the 1987 captain's eligibility list would have yielded 4.7 percent Hispanic promo-

tions, the only problem being that there were no Hispanics in the first group to be promoted from the list—is that the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order. It is impossible to choose between these hypotheses on the basis of the record compiled in the summary judgment proceedings.

There is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons. There is fear that persons who have not been discriminated against will be advanced at the expense of persons who have neither practiced nor benefited from discrimination. The Supreme Court in the *Croson* decision made clear that cities and states would have to furnish convincing evidence that their affirmative-action programs were not of this character but were instead sensitive, good-faith measures to remedy the unlawful practices in which they had engaged in the past. The defendants have not shown this strongly enough to permit the dismissal of the plaintiffs' claims without a trial.

These cases, filed in 1987, were first argued in this court more than two years ago. We regret the delay in deciding them and would like to bring them to an end but have concluded that it was premature to terminate them by a grant of summary judgment. In the hope of expediting the proceedings that must resume in the district court we direct that the cases be consolidated in that court and assigned to a single judge.

REVERSED AND REMANDED, WITH DIRECTIONS.

RIPPLE, *Circuit Judge*, with whom BAUER, *Chief Judge*, CUMMINGS, and CUDAHY, *Circuit Judges*, join, dissenting. These cases were resolved correctly, according to the law and the facts, in the panel opinion. 962 F.2d 1269 (7th Cir. 1992). For the reasons set forth in that opinion, the judgment in *Billish v. City of Chicago* (No. 90-1650), should be affirmed in part and reversed and remanded in part. The judgment in *Chicago Fire Fighters Union v. Daley* (No. 90-2182), should be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1650

EARL BILLISH, JOHN CARASOTTI,
MARTIN DUNNE, RICHARD A. GRAF,
JOHN HERLING, EDWARD JAQUSZEWSKI,
DENNIS R. SMITH, HENRY SCAVONE
and JOHN SCHMIDT,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO and LOUIS T. GALANTE,
individually and officially,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 8731—*James B. Zagel, Judge.*

No. 90-2182

CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2,
JOHN M. CRAVEN and LARRY W. ANOMAN, *et al.*,
Plaintiffs-Appellants,

v.

RICHARD M. DALEY,* LOUIS T. GALANTE
and JESSE HOSKINS, *et al.*,
Defendants-Appellees.

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* Richard M. Daley is substituted for Harold J. Washington pursuant to Federal Rule of Appellate Procedure 43(c).

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 7295—*James F. Holderman, Judge.*

ARGUED DECEMBER 7, 1990—DECIDED MAY 4, 1992

Before POSNER and RIPPLE, *Circuit Judges,* and GRANT, *Senior District Judge.***

RIPPLE, *Circuit Judge.* While these two cases, *Billish* and *Chicago Fire Fighters,* are distinct lawsuits and were heard by different judges in the district court, the parties, counsel, legal issues, and facts in both cases significantly overlap. Accordingly, we consolidate them for purposes of decision on appeal. In both cases, nonminority members of the Chicago Fire Department (CFD) challenge as discriminatory the CFD's decisions to promote various individuals pursuant to an affirmative action program implemented by the City of Chicago (the City). They claim that those promotion decisions violated the Equal Protection Clause and, in one case, the Due Process Clause, of the Fourteenth Amendment. In both cases, the district court granted the City's motions for summary judgment. For the following reasons, we affirm the judgment of the district court in *Chicago Fire Fighters* (No. 90-2182), and we affirm in part and reverse and remand in part the judgment of the district court in *Billish* (No. 90-1650).

** The Honorable Robert A. Grant, Senior District Judge, United States District Court for the Northern District of Indiana, is sitting by designation.

I

BACKGROUND

The uniformed, non-exempt fire suppression ranks of the CFD, in ascending hierarchical order, consist of firefighter, engincer, lieutenant, captain, and battalion chief. No special training or academic achievement is required for the entry-level position of firefighter. Vacancies at the upper ranks, however, are filled from eligibility lists compiled after job-related examinations are conducted. In general, only candidates who hold the rank immediately below the rank being tested are eligible to take the examination. A firefighter, however, may sit for the lieutenant exam—and may be directly promoted to lieutenant—without spending time as an engineer. After an exam is completed, the candidates are listed on an eligibility list in rank order, *i.e.*, the highest scoring candidate is ranked first and the other candidates are numerically ranked according to their respective scores.

A. *Antecedent Litigation and Settlement Order*

These two cases present challenges to the promotion procedures employed by the CFD. These cases are not the first, however, to challenge the promotion (or hiring) procedures of the CFD. In 1973, the United States Department of Justice (DOJ) brought a civil rights action against the City claiming that the hiring and promotion practices of the CFD unlawfully discriminated against blacks and Hispanics. At the time of the suit, blacks and Hispanics comprised less than 5% of the uniformed personnel in the CFD. The DOJ moved for a preliminary injunction of the challenged practices, but the district court denied the motion. This court entered an interlocutory injunction against the City on the DOJ's discriminatory hiring claims. *See Chicago Fire Fighters Union Local No. 2 v. Washington,* 736 F. Supp. 923, 927 (N.D. Ill. 1990) (describing case history). Thereafter, the City de-

termined that it could not defend successfully against these claims. Accordingly, the City entered into a consent decree in 1974 (the 1974 consent decree), which established an interim 50% minority (black and Hispanic) hiring ratio and a long-range goal requiring the City to increase significantly the minority composition of the CFD so as to reflect ultimately the minority composition of the City.

Little hiring occurred between 1974 and 1978 in the CFD. Consequently, the interim hiring ratio established in the 1974 consent decree did little to improve the minority proportion in the CFD. Indeed, by September of 1978, minorities comprised only about 9% of the CFD's uniformed personnel. The DOJ returned to the district court seeking an order to extend through 1980 the hiring goals set forth in the 1974 consent decree. On September 12, 1978, the district court granted the motion in part; the court ordered the City to fill 120 of the next 280 firefighter vacancies with minority candidates and maintain the long-range hiring goal articulated in the 1974 consent decree. R.71 (Chicago Fire Fighters) Ex.A. In June 1979, the district court granted another DOJ motion and ordered that, if the new 1979 hiring eligibility list were used for more than two years or 500 names, 50% of all further hiring must be of minority candidates. R.71 (Chicago Fire Fighters) Cole Aff. ¶ 8.

As for promotions, the DOJ challenged as discriminatory the City's promotion examinations for engineer, lieutenant, and captain administered in the late 1960s and early 1970s. While the district court upheld the validity of these exams under Title VII, this court granted the DOJ's motion for an injunction pending appeal enjoining the City from making any permanent promotions based on the engineer and lieutenant examinations. *See United States v. City of Chicago,* 573 F.2d 416, 420 (7th Cir. 1978). Once this court reached the merits on appeal, it

determined that the district court applied the wrong legal standard in evaluating one aspect of the promotion examinations and that further findings of fact were necessary; therefore, this court reversed the decision of the district court and remanded for further proceedings. *See id.* at 416, 424-29. Furthermore, this court granted interim relief by modifying its prior injunction. We enjoined any permanent promotions based on the engineer, lieutenant, and captain promotion examinations unless the promotions were "first offered to minority candidates on the respective lists in the order of their rank thereon." *Id.* at 429. In 1978, prior to the completion of the remand proceedings, the City administered new promotion examinations for each rank in the CFD. The DOJ, in early 1980, informed the City that it intended to file a new suit challenging those promotion examinations because they had a severe adverse impact against minority candidates.

In response, representatives of the City and the CFD met together to assess the strengths and weaknesses of the DOJ's case. They concluded that the examinations indeed had an adverse impact on minority candidates, that the examinations had not been properly validated, particularly for use in ranking candidates, and that the efficiency ratings (one part of the candidate's final score) were racially discriminatory. In light of the strength of the DOJ's case, the litigation costs, and the recognition that the promotion scheme had treated unfairly black and Hispanic members of the CFD, the City decided to settle the suit. During the settlement agreement negotiations, the DOJ proposed a 1-to-4 minority/nonminority promotion ratio as an interim requirement for promotion to all ranks until new, validated promotion examinations could be administered and new promotion lists posted. The City agreed to the proposal, except to the extent that the 1-to-4 ratio applied to the ranks of captain and battalion chief. The City maintained that the ratio was not feasible considering the few minorities whose current rank made them

eligible for promotion to captain or battalion chief. The City proposed that the 1-to-4 ratio apply to the ranks of engineer and lieutenant and that a long-term promotion goal be instituted, which would require the City to increase substantially minority participation at each rank (including captain and battalion chief), so that the minority composition of each rank would mirror the racial composition of the preceding rank.

The DOJ agreed with the City's counter-proposal, and it was drafted into a settlement agreement. The district court approved the settlement agreement and incorporated it into an Order of Settlement entered March 31, 1980 (1980 settlement order). It states that

> defendants, as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks [of the CFD] with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

R.25 (Billish) Ex.I at 2-3. The 1980 settlement order further required the City to employ a 1-to-4 minority/non-minority promotion ratio for any promotions beyond number 213 on the 1979 engineer eligibility list and/or number 113 on the 1979 lieutenants list. If necessary to meet the 1-to-4 ratio, the order instructed that "the 1979 Engineer and Lieutenant Eligibility List shall be expanded by reducing the cut off score from 70." *Id.* at 3. The City also was required to compile new promotion eligibility lists consistent with the long-range goals mentioned above. The new lists had to be designed to reduce or eliminate any adverse impact on black or Hispanic candidates for promotions and had to ensure against unlawful discrimination against those candidates. Finally, the City was

required to provide appropriate training to those seeking promotion.[1]

B. *Collective Bargaining Agreement*

In 1980 the City and the Chicago Fire Fighters Union (Union) entered into their first collective bargaining agreement (CBA). R.25 (Billish) Ex.D. Subsequently, the CBA was codified as a city ordinance. It provides that, in filling promotion vacancies, promotions will "customarily" be made in rank order. The CBA also contains an affirmative action provision. R.25 (Billish) Ex.D at 64-67. Under the CBA, the City is required to comply with agreements reached and decrees issued in court actions affecting hiring and promotion, to create hiring programs with the goal of achieving "in the shortest possible time a total force in which approximately thirty percent shall be Black and fifteen percent Hispanic," and to provide promotion policies with the goal of including "Black and Hispanic personnel in all categories and all ranks in order to reach as quickly as is reasonably possible a level as close to 45% as is reasonably achievable." R.25 (Billish) Ex.A at 77. This same language has been in every CBA since 1980. R.71 (Chicago Fire Fighters) Stensland Aff. ¶ 12.

C. *Summary of Remaining Relevant Facts*

The facts underlying the *Billish* case occurred before those in *Chicago Fire Fighters.* On the other hand, from an analytical perspective, it is more useful to deal with the merits of *Chicago Fire Fighters* before turning to *Billish.*

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[1] In 1985, the DOJ moved to eliminate "any race or national origin hiring or promotional preference" in the 1980 settlement order because of the Supreme Court's then-recent decision in *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984), which the DOJ read as forbidding promotional preference based on race or national origin to non-victims of illegal discrimination. The district court denied the motion. R.71 (Chicago Fire Fighters) Ex.H.

To assist the reader, we shall set forth chronologically, at this point, a summary of the factual circumstances underlying each case. A more detailed rendition of the facts pertinent to each case will be presented with our analysis.

Following the 1980 consent decree, promotions were made from the 1979 eligibility lists for each rank. In August 1983, the new Fire Commissioner, Louis G. Galante, realized that these lists were getting stale, so he ordered the preparation of a new set of promotion examinations for each rank. These exams were prepared and given in ascending order: engineer first, lieutenant second, captain third, and battalion chief last. The first examination, the engineer exam, was not administered until 1985. The engineer eligibility list was posted in 1986. Next, a lieutenant exam was administered, and a lieutenant eligibility list was posted. In the fall of 1986, the first part of a two-part captain examination was given. In December 1986, Commissioner Galante determined, according to the City, that he had an operational need for additional fire captains. Because the captain examination was not complete, and thus a new captain eligibility list was far from ready, Commissioner Galante looked to the 1979 list to make these promotions. On December 25, 1986, he ordered the promotion of eighteen lieutenants to captain (and, at the same time, ordered promotions in the other ranks), effective January 16, 1987. The eighteen promotions were made in rank order from the 1979 eligibility list, and each of the promotees was white. Soon thereafter, Commissioner Galante inquired of the City Personnel Department whether there were any black or Hispanic lieutenants remaining on the 1979 list. He was told there were two minority lieutenants on the list but, because both had scored below the cut-off score of 70, that cut-off score would have to be lowered before they could be eligible for promotion to captain. Commissioner Galante asked the Personnel Department to lower the passing score. The Personnel Department determined that

the scores and additional experience of these two lieutenants were sufficient to qualify them for promotion and, on this basis, certified them for promotion on January 12. On January 13, Commissioner Galante ordered their promotion to captain, out of rank order, effective the same date the December promotions were to become effective, January 16. By May 1987, the second half of the captain examination had been administered but the new captain eligibility list had not yet been drawn up. Commissioner Galante considered promoting five additional captains, but he decided to wait until the new captain eligibility list was ready.

In June and July of 1987, in two separate letters, Commissioner of Personnel Jesse E. Hoskins informed Fire Commissioner Galante that promotions to engineer and captain "should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1, Ex.F at 1. In August 1987, Commissioner Galante issued an order to promote fifty-six firefighters to engineer from the new engineer eligibility list. The first forty-eight, including seven black firefighters and two Hispanic firefighters, were promoted in rank order. However, the last eight were black firefighters who were promoted out of rank order. R.71 (Chicago Fire Fighters) Ex.L, Ex.N. In October 1987, the new captain eligibility list was posted and Commissioner Galante promoted twenty-four lieutenants to captain. The first twenty-three were promoted in rank order, including five black lieutenants, but the twenty-fourth lieutenant—a Hispanic—was promoted out of rank order. R.71 (Chicago Fire Fighters) Ex.M, Ex.N.

The *Billish* suit was brought by nine white fire lieutenants who were next on the 1979 captain eligibility list when Commissioner Galante lowered the cut-off score to allow the two minority lieutenants to be promoted in Jan-

uary 1987. The *Billish* plaintiffs challenge the lowering of the cut-off score and the subsequent promotions, as well as Commissioner Galante's refusal to draw further from the 1979 captain eligibility list. The *Chicago Fire Fighters* suit was brought by the Union and twenty-two white firefighters and lieutenants who were passed over in the affirmative action promotions to engineer and captain in August and October 1987. In both cases, plaintiffs sued under 42 U.S.C. § 1983 for violations of their rights under the Equal Protection Clause. In addition, the *Billish* plaintiffs asserted a violation of their due process rights.

II

ANALYSIS

A. *Applicable Standards*

Both district courts granted the City's motions for summary judgment on the equal protection claims. The *Billish* court also granted the City's motion for summary judgment on the plaintiffs' due process claim. We review de novo a district court's grant of summary judgment. *Doe v. Allied-Signal Inc.*, 925 F.2d 1007, 1008 (7th Cir. 1991). Our task is to determine whether the record reveals that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). "A motion for summary judgment is not an appropriate occasion for weighing the evidence; rather, the inquiry is limited to determining if there is a genuine issue for trial." *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). We " 'must view the record and all inferences drawn from it in the light most favorable to the party opposing the motion.' " *Lohorn*, 913 F.2d at 331 (quoting *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989)).

Both the *Billish* and *Chicago Fire Fighters* plaintiffs charge that the City's affirmative action promotions violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In an equal protection challenge, affirmative action programs are subject to strict scrutiny analysis. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 520 (1989).[2] Strict scrutiny is used to determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493. Under strict scrutiny, affirmative action must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest. *Id.* at 505-08; *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality). We address both of these requirements in relation to the issues raised by each case.

B. *Chicago Fire Fighters Union Local No. 2 v. Daley* (No. 90-2182)

1. Facts

The *Chicago Fire Fighters* case involves promotions from the 1986 engineer eligibility list and the 1987 captain eligibility list.

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[2] In *Croson*, a plurality composed of Justices O'Connor, White, Kennedy, and Chief Justice Rehnquist was joined by Justice Scalia, in concurrence, in holding that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." 488 U.S. at 493-94 (plurality), 520 (concurrence). Indeed, Justice Marshall noted the significance of this holding in his dissent: "Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures." *Id.* at 551. While this position previously had been asserted in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (Justice Powell, joined by Justice Rehnquist and Chief Justice Burger), 285-86 (concurrence of Justice O'Connor), it failed to gain majority approval.

During 1985, the City, in cooperation with the CFD and the Personnel Department, administered a two-part engineer examination consisting of a written test and a simulator (or hands-on) test. All firefighters were eligible to take the written exam. When the written part of the exam was scored, the City realized that the exam had a severe adverse impact on minorities.[3] Therefore, to minimize the effect of the adverse impact, the Personnel Department standardized the scores. All firefighters who passed the written test qualified to take the simulator portion of the examination, in which they operated specially designed pumps similar to those used by the CFD. The simulator portion of the exam accounted for 90% of the total score; seniority comprised the other 10%. In February 1986, the City posted the new engineer eligibility list.

In June and December of 1986, the new engineer eligibility list was used to promote two sets of firefighters to engineer. In June 1987, Commissioner of Personnel Hoskins informed Fire Commissioner Galante that the third set of engineer promotions from the new list "should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1. Commissioner Hoskins stated that the affirmative action was necessary to comply with the affirmative action directives of the 1980 settlement order and the current CBA. Moreover, the affirmative action was necessary to "remedy the effects of past discrimination." *Id.* at 2. Commissioner Hoskins also indicated that failure to promote on an affirmative action basis would violate Title VII because the engineer promotion procedure, when used as a ranking device, had an adverse impact on minorities. Accordingly, in August 1987, Commissioner Galante issued an order

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[3] The reasons behind the City's conclusion that the written test had an adverse impact are discussed below. *See infra* pp. 30-34 [46a-51a].

that eventually promoted fifty-six firefighters to the rank of engineer. The last eight firefighters—all black—were promoted out of rank order.

The City administered a two-part captain examination in the fall of 1986 and the spring of 1987. This examination consisted of a written test and oral interview. The written portion accounted for 65% of a candidate's score, the oral interview 25%, and seniority 10% of the total score. Because, in the oral interview, some administrators gave lower average scores or narrower ranges of scores than others, the Personnel Department standardized these scores to neutralize the differences. The passing score was set at 70. On July 13, 1987, the City canceled the 1979 captain eligibility list and made the new captain eligibility list effective.

On July 9, 1987, Commissioner Hoskins notified Commissioner Galante that promotions to captain should also be made with the goal of promoting 20% black and 5% Hispanic. Thus, in October 1987, Commissioner Galante issued an order promoting twenty-four lieutenants to the ~~rank of~~ captain. The first twenty-three were promoted in rank order, the final lieutenant—a Hispanic—was promoted out of rank order.

The Union and certain nonminority members of the CFD holding the rank of firefighter or lieutenant (collectively "*Chicago Fire Fighters* plaintiffs" or "plaintiffs") brought a two-count complaint against the City under 42 U.S.C. § 1983 alleging that the out-of-rank promotions subjected them to discrimination in violation of the Equal Protection Clause. In Count I, the firefighter plaintiffs maintained that the promotions prevented them from being promoted to engineer. In Count II, the lieutenant plaintiffs contended that the promotions prevented them from being promoted to captain. The City moved for summary judgment.

2. Holding of the district court

The court established the framework for its analysis by recognizing that, under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a court must apply strict scrutiny to an affirmative action policy to determine whether it violates the Equal Protection Clause. "To survive this heightened scrutiny," the court noted, "the policy must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest." *Chicago Fire Fighters Union Local No. 2 v. Washington*, 736 F. Supp. 923, 926 (N.D. Ill. 1990).

The court first addressed the compelling governmental interest component of the strict scrutiny analysis. The court agreed with the City that there would be a compelling interest "in remedying past (and present) racial discrimination in making promotional decisions." *Id.* While a " 'contemporaneous or antecedent finding of past discrimination by a court or other competent body' " is not a prerequisite to a public employer's voluntary affirmative action program, *id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 (1986) (O'Connor, J., concurring)), the district court stated that there must be some showing of prior discrimination by the governmental entity involved. Moreover, the court observed that, as a factual matter, a governmental body engaging in affirmative action must show a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " 736 F. Supp. at 926 (quoting *Croson*, 488 U.S. at 500). Relying on *Wygant*, 476 U.S. at 277-78, 293, the court noted that, while the City had to establish a strong basis for the propriety of its remedial action, the *Chicago Fire Fighters* plaintiffs retained the ultimate burden of demonstrating that the out-of-rank promotions were unconstitutional. 736 F. Supp. at 926. The court then recounted the history of DOJ's litigation against the City and the resulting affirmative action directives contained in the 1980 settlement order, and the affirmative action goals embodied in

the CBA between the City and the Union. *See id.* at 927-29. The court concluded that evidence of prior discrimination was provided by our rulings in *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). *See* 736 F. Supp. at 928. The court also discussed the disparities between the minority representation in the engineer and captain ranks and the representation in the ranks immediately below them, and the discriminatory adverse impact of the engineer examination on minorities. *See id.* at 929-31. Based on this evidence, the court concluded that "there is no genuine issue of material fact that the City had a strong basis in evidence for its conclusion that its affirmative action promotions were necessary." *Id.* at 931-32.

The court next turned to the issue of whether the affirmative action program was narrowly tailored to accomplish its purpose. Relying on *United States v. Paradise*, 480 U.S. 149 (1987), the district court identified several factors relevant to this inquiry: the necessity of the relief and availability of alternative remedies; the flexibility and duration of the remedy; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on third parties. *Id.* at 932. The court concluded that each of the factors favored the affirmative action remedy implemented by the City. Therefore, the court held that "there is no genuine issue of material fact that the City's affirmative action goals at issue here were narrowly tailored to their remedial purpose." 736 F. Supp. at 933. Having found that the affirmative action program served a compelling governmental interest and that the program was narrowly tailored to serve that interest, the court granted the City's motion for summary judgment.[4]

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[4] The court also held that, regardless of its ruling on the equal protection claim, Fire Commissioner Galante and Commissioner of Personnel Hoskins were entitled to qualified immunity because, in promulgating the affirmative action program, they were performing a discretionary function and their conduct was not contrary to " 'clearly established statutory or constitutional rights of

3. Standing of plaintiffs who were not passed over

Initially, we consider the *Chicago Fire Fighters* plaintiffs' contention that the district court erred in granting the City's motion to dismiss for lack of standing thirteen of the twenty firefighter plaintiffs and one of the two lieutenant plaintiffs. In reviewing a motion to dismiss for want of standing, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 498. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Supreme Court articulated the minimum constitutional requirements for standing:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Id. at 472 (quoting *Gladestone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon v. Eastern*

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which a reasonable person would have known.'" 736 F. Supp. at 933-34 (quoting *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990)). Plaintiffs raised this on appeal as an "Issue for Review," but failed to make any argument to this court other than a brief comment in a footnote to their brief that the grant of qualified immunity was "premature." Appellant's Br. at 41 n.25. We need not consider a claim presented in such a perfunctory manner. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.) (collecting cases), *cert. denied*, 112 S. Ct. 141 (1991). Even if the issue were properly briefed, we would not reach it because our disposition of the merits of the case renders moot any question of qualified immunity.

Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

In the City's view, the affirmative action did not cause the dismissed plaintiffs any injury. The City argued before the district court that, even had the promotions been made in strict rank order, those plaintiffs would not have been offered promotions. *See* Memorandum Opinion and Order of January 20, 1989, (R.55 (Chicago Fire Fighters)) at 5.[5] The district court began by noting that the City did not bypass any of the thirteen firefighter plaintiffs or the lieutenant plaintiff when the City certified eight black firefighters and one Hispanic lieutenant for promotion on the basis of race. *Id.* at 7-8. Furthermore, the court declined to accept the plaintiffs' argument that they sufficiently alleged standing because they were currently threatened by a recurrence of the out-of-rank-order promotions. The court reasoned that, before the challenged promotions, promotions were based on strict rank order, and the City had not conceded nor had the plaintiffs alleged that the City would make future promotions out of rank order. *Id.* at 9. Therefore, the court granted the City's motion.

The district court's ruling was correct. The plaintiffs in question suffered no direct injury from the non-rank-order promotions. As the court noted, even had the City made the promotions in strict rank order, those fourteen plaintiffs would not have been promoted. *Cf. Donaghy v. City of Omaha*, 933 F.2d 1448, 1455 (8th Cir. 1991) (plaintiff would not have had a "distinct and palpable injury" if he would not have been promoted had the promotions been made in strict rank order), *cert. denied*, 112 S. Ct. 938 (1992). The plaintiffs contend, however, that, because the City has expressed its willingness to continue to pursue affirmative action promotions, they have standing

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[5] *See Chicago Fire Fighters Union Local No. 2 v. Washington*, No. 87 C 7295, 1989 WL 6770 (N.D. Ill. Jan. 20, 1989).

based on a threat of future injury. To satisfy the standing requirement under this theory:

> The plaintiff must show that he . . . "is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the . . . threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (quoting *Golden v. Zwickler,* 394 U.S. 103, 109-10 (1969)); *see O'Shea v. Littleton,* 414 U.S. 488, 497 (1974) (plaintiff must base standing on more than speculation and conjecture that harm will occur in the future). The plaintiffs' allegation that they will be injured in the future is speculative. Even if the City pursues affirmative action, the vast majority of the promotions to engineer and captain will be in rank order. Given the plaintiffs' positions on the eligibility lists, they will most likely be promoted in the course of the next promotion.[6] Therefore, we affirm the district court's dismissal of certain plaintiffs for lack of standing.

4. Equal protection analysis

a. compelling governmental interest

The basis for the *Chicago Fire Fighters* lawsuit was the promotion of certain minority firefighters and a minority lieutenant out of rank order from the 1986 engineer and

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[6] As the City notes, after the promotions at issue here, the highest ranking of the firefighters dismissed from the lawsuit was ranked twelfth on the engineer eligibility list and the lowest ranking firefighter was ranked fortieth. The lieutenant dismissed from the lawsuit was ranked second on the captain eligibility list. If the City follows the same procedure for its next hiring as it did in this case, it will promote forty-eight firefighters in rank order and eight out of rank order. All of the firefighters dismissed from the lawsuit would, therefore, be promoted. The lieutenant dismissed from the lawsuit would also likely be promoted, given his high ranking.

1987 captain eligibility lists. The City argues that it had a compelling interest in making these out-of-rank-order promotions—the elimination of the effects of past and present discrimination in the CFD promotion procedure. Rectifying the effects of identified discrimination within a state or municipal jurisdiction has been recognized as a compelling governmental interest. *See Croson*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.), 509 (plurality); *Paradise*, 480 U.S. at 167 (plurality); *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment). However, a necessary prerequisite to undertaking a program designed to remedy discrimination is a strong factual basis for believing that discrimination occurred. In *Wygant*, Justice O'Connor stated that she "agree[d] with the plurality that a contemporaneous or antecedent *finding* of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." 476 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). Societal discrimination, however, is not enough; there must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274 (plurality). In *Croson*, writing for a majority of the justices, Justice O'Connor clarified the type of showing necessary to justify affirmative action. There must be a " '*strong basis* in evidence for [the defendant's] conclusion that remedial action was necessary.' " 488 U.S. at 500 (emphasis added) (quoting *Wygant*, 476 U.S. at 277). As the district court correctly observed, while the City must demonstrate a "strong basis" for the affirmative action, the plaintiffs bear the ultimate burden of proving that the City violated their rights. *Chicago Fire Fighters*, 736 F. Supp. at 926.[7] The

[7] As the *Wygant* plurality noted, "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an

City maintains that it had a strong basis for its conclusion that prior discrimination existed in the CFD and, therefore, the affirmative action promotions were necessary. It gives four reasons to support this assertion. We shall examine each.

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affirmative-action program." 476 U.S. at 277-78. In her separate concurrence, Justice O'Connor explained the significance of this statement:

> In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the [School Board] introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board has a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

Id. at 292-93 (O'Connor, J., concurring in part and concurring in the judgment). *Croson* did not directly address this issue. Like other circuits that have considered the matter, we rely upon *Wygant*. *See Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992); *Howard v. McLucas*, 871 F.2d 1000, 1006 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989); *see also Stuart v. Roache*, 951 F.2d 446, 451 (1st Cir. 1991), *petition for cert. filed*, No. 91-1516 (Mar. 20, 1992); *Hammon v. Barry*, 813 F.2d 412, 445 (D.C. Cir. 1987) (Mikva, J., dissenting); *cf. Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1036 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989).

(i) prior litigation and the 1980 settlement order

The City entered into the 1974 consent decree concerning hiring and the 1980 settlement order concerning promotion only after extensive litigation with the DOJ. The City argues that the litigation history and the 1980 settlement order provide a strong basis for concluding that affirmative action promotions to the rank of engineer and captain were necessary to remedy prior discrimination. We believe that the entire litigation history of the CFD on the issue of racial discrimination in its ranks provides strong support for the City's position.

We shall not repeat here the factual basis for the initial suit. *See supra*, pp. 11-13 [26a-28a]. A brief summary will make it clear that the City of Chicago's assessment that its policies violated the Constitution was a realistic one. The DOJ brought suit against the City in 1973 to challenge as discriminatory the hiring and promotion procedures in the CFD. On interlocutory appeal of the district court's denial of the DOJ's motion for preliminary injunction, this court temporarily enjoined the City from further hiring pending resolution of the appeal. Soon thereafter, in 1974, the City determined that it could not defend successfully its hiring practices and thus agreed to abide by a consent decree which established a temporary minority hiring ratio and a long range goal of substantially increasing minority representation in the CFD. This action suggests that the DOJ had established a discrimination case likely to succeed on the merits. Thus, the 1974 consent decree provides strong evidence of prior discriminatory *hiring* practices in the CFD.

In 1978, reviewing a later DOJ challenge to the CFD's *promotion* practices, this court enjoined promotions stemming from the 1969 engineer, 1970 lieutenant, and 1973 captain examinations unless the promotions were first offered to minorities on the eligibility lists. *See United States v. City of Chicago*, 573 F.2d 416, 429 (7th Cir.

1978). During remand proceedings in 1978, the City administered a new set of promotion examinations for each rank in the CFD. After the DOJ announced its intention to challenge the adverse impact of these new examinations, the City agreed to enter into the 1980 settlement order. This order required the City to create and implement long-range promotion goals to increase substantially the minority composition of each rank of the CFD so that each rank would represent more closely the composition of the preceding rank. R.71 (Chicago Fire Fighters) Ex.B at 2-3. More specifically, the settlement order required the City to promote one black or Hispanic for every four whites promoted from the 1979 engineer and lieutenant eligibility lists until new, validated promotion examinations for these ranks were administered. R.71 (Chicago Fire Fighters) Ex.B at 3. While the captain rank was not subject to the 1-to-4 minority/nonminority promotion ratio, the negotiation history of the settlement order reveals that this difference was due to the absence of enough blacks and Hispanics on the 1979 captain eligibility list to support such a ratio. R.71 (Chicago Fire Fighters) Cole Aff. ¶ 16. The 1980 settlement order, like a consent decree, was subject to judicial review and approval. "While the entry of an affirmative action consent decree does not guarantee that the decree serves a remedial purpose or is narrowly tailored, the heightened judicial oversight inherent in a properly entered decree helps attain that end." *Donaghy*, 933 F.2d at 1459; *see also Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991) (consent decree requiring affirmative action promotions in police force upheld under strict scrutiny), *petition for cert. filed*, No. 91-1516 (Mar. 20, 1992).[8]

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[8] At this court's invitation, the DOJ submitted a brief as amicus curiae on the issue whether the 1980 settlement order required the City to undertake the affirmative action challenged in this case. The DOJ suggests that material issues of fact exist regarding the extent to which the effects of pre-1980 discrimination, which was the subject of the 1980 consent decree, were adequately remedied

Despite the specific hiring ratios and long-term goals, however, by 1987, the percentage of minority captains (3.6%) had actually decreased from the percentage in 1979 (6.0%) and the percentage of minority engineers (11.0%) was still less than half the percentage of minority firefighters (29.2%). R.71 (Chicago Fire Fighters) Cole Aff. ¶ 12, Stensland Aff. ¶ 19. Faced with this situation in 1987, the City concluded that affirmative action was necessary to comply with the 1980 settlement order. The City's compliance with the 1980 settlement order was " 'supported not only by the governmental interest in eradicating [the City's] discriminatory practices, it [was] also supported by the societal interest in compliance with the judgment of federal courts.' " *United States v. Paradise*, 480 U.S. 149, 170 (1986) (quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 480 (1986)); *see also Ustrak v. Fairman*, 781 F.2d 573, 577 (7th Cir.) (consent decree establishing preference for minorities alone not enough to "carry the day" in affirmative action case), *cert. denied*, 479 U.S. 824 (1986). On this basis, we agree with the district court that "although there exist no formal findings of past discrimination in the CFD, the litigation history of the CFD's past hiring and promotion practices offers at least some

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by affirmative action between 1980 and 1986. Until this issue is resolved, the DOJ argues, it is impossible to determine whether, in 1987, the settlement order necessitated further affirmative action. Amicus Br. at 20-23. However, as the City notes, while the percentage of minorities had increased substantially in the lower ranks, these changes were not filtering up to the upper ranks. The minority representation in the captain rank had actually decreased. Thus, the racial disparity between the ranks that existed in 1980 remained a problem in 1987. Furthermore, as the City also points out, the settlement agreement had not been modified or vacated and thus still had the force of law. Supplemental Br. of Appellees at 7-8. We are persuaded that there is no genuine issue of fact that effects of pre-1980 discrimination remained to be eradicated as of 1987 and, thus, the standing settlement order properly contributed to the City's strong basis for engaging in the affirmative action at issue here.

evidence of past discrimination." *Washington,* 736 F. Supp. at 929.

The *Chicago Fire Fighters* plaintiffs contend that the litigation history provides no evidence of past discrimination because no formal finding of discrimination was made during the litigation. No such finding was necessary. As noted previously, *see supra* p. 18 [34a] in *Wygant,* six justices held that a government body may engage in affirmative action without a court or other government body formally finding that the government body previously discriminated. *See* 476 U.S. at 277-78 (plurality, including O'Connor, J.); *id.* at 287, 289-92 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 304-05, 312 n.7 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting); *see also Donaghy,* 933 F.2d at 1459 ("Formal findings of past discrimination need not precede a public employer's adoption of a remedial affirmative action plan."). Indeed, as Justice O'Connor has warned:

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law."

Wygant, 476 U.S. at 290 (citations omitted) (quoting *Regents of the University of California v. Bakke,* 438 U.S. 265, 364 (1978)). Instead, both *Wygant* and *Croson* teach that the touchstone for affirmative action is whether the government entity had a "strong basis" to conclude that remedial action was necessary. *See Croson,* 488 U.S. at 500; *Wygant,* 476 U.S. at 277-78 (plurality), 286 (O'Connor, J., concurring in part and concurring in the judgment); *see also Davis v. City & County of San Fran-*

cisco, 890 F.2d 1438, 1446 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990); *Howard v. McLucas*, 871 F.2d 1000, 1007-08 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989).

The *Chicago Fire Fighters* plaintiffs further contend that the City's reliance on the litigation history as a basis for its compelling interest is a "mere afterthought." The plaintiffs concede that the City took the 1980 settlement order into account in 1987 when it decided to engage in affirmative action, but submit that the City never mentioned the 1970's litigation until it became embroiled in this lawsuit. The record belies this argument. In Personnel Commissioner Hoskins' June 16 and July 9, 1987, letters to Commissioner Galante recommending affirmative action in the ranks of captain and engineer, Commissioner Hoskins cited the litigation history among the reasons compelling affirmative action.[9] Thus, the litigation history is not "mere afterthought," but contributed to the

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[9] Personnel Commissioner Hoskins' letters both included the following passage:

> The unfortunate reason for this [disparity among the ranks] is past discrimination by the City. Prior to the late 1970s, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, i.e., unvalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

R. 71 (Chicago Fire Fighters) Ex.E at 2, Ex.F. at 2. Commissioner Hoskins also noted, as an additional reason for affirmative action promotion, the CFD's interest in maintaining community confidence and trust. Commissioner Hoskins observed that the CFD, like the police department, "is a community service organization which needs the trust and cooperation of the community it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels." R. 71 (Chicago Fire Fighters) Ex.E. at 4, Ex.F. at 4.

City's basis for concluding that affirmative action was necessary.

(ii) the collective bargaining agreement

The City also maintains that the CBA between the City and the Union necessitated the remedial action taken in this case. As we discussed, the CBA requires the City to comply with affirmative action decrees and agreements reached in court actions and to promote with the goal of including minorities at all ranks to "reach as quickly as is reasonably possible a level as close to 45% as is reasonably achievable." R.82 (Chicago Fire Fighters) Ex.3 at 87. The district court acknowledged that "[t]he existence of an affirmative action goal in a [CBA] alone may not be sufficient" to provide the City with a strong basis for concluding that non-rank-order promotions were necessary. 736 F. Supp. at 929. Nevertheless, as the district court concluded, while the affirmative action provisions in the CBA may not prove the existence of past discrimination, they certainly corroborate it.

(iii) minority underrepresentation statistics

Next, the City maintains that statistics showing minority underrepresentation in the CFD ranks provided strong evidence that past discrimination still had a strong effect in the CFD. "[S]tatistics can be an important source of proof in employment discrimination cases . . . ." *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307 (1977).[10] The district court noted that "a statistical im-

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[10] Although *Hazelwood* was a Title VII case rather than an equal protection case, the statistical methodology used in Title VII cases is also probative in equal protection analysis. *See Croson*, 488 U.S. at 509 ("Where there is a sufficient statistical disparity between the number of qualified minority contractors willing and able to perform a service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.") (citing Title VII cases); *Id.* at 500 (a prima facie case of Title VII violation is evidence of compelling governmental interest under equal protection analysis).

balance sufficient for a Title VII prima facie case would satisfy the constitutional requirement that the City have a 'strong basis' for believing that remedial action was required." *Chicago Fire Fighters,* 736 F. Supp. at 929. Indeed, the district court cited the City's statistics as "the strongest evidence of past discrimination in the CFD." *Chicago Fire Fighters,* 736 F. Supp. at 929.

As noted, a prerequisite for promotion to engineer or captain is a candidate's position as firefighter or lieutenant. Thus, for purposes of evaluating underrepresentation in the engineer and captain ranks, the appropriate statistical comparison is between the percentage of blacks and Hispanics in those ranks and the percentage of blacks and Hispanics in the firefighter and lieutenant ranks. "The 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.'" *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650 (1989) (quoting *Hazelwood,* 433 U.S. at 308 n.13); *EEOC v. Chicago Miniature Lamp Works,* 947 F.2d 292, 302 (7th Cir. 1991); *see Croson,* 488 U.S. at 501-02; *Janowiak v. Corporate City of South Bend,* 836 F.2d 1034, 1039-40 (7th Cir. 1987), *cert. denied,* 489 U.S. 1051 (1989); *see also Mayor of Philadelphia v. Educ. Equality League,* 415 U.S. 605, 620 (1974). A significant statistical disparity between the ranks would support an inference of past racial discrimination. *See Wards Cove,* 490 U.S. at 650; *Croson,* 488 U.S. at 509 (plurality); *Bazemore v. Friday,* 478 U.S. 385, 398 (1986); *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 337-39 (1977). In June 1987, when Commissioner Hoskins requested the affirmative action promotions, 11% of the engineers were minorities, compared to 29.2% of the firefighters; and 3.6% of the captains were minorities, compared to 13.6% of the lieutenants. *See Chicago Fire Fighters,* 736 F. Supp. at 930. As the district court observed, if the difference between the expected

percentage of minorities and the observed percentage of minorities in the relevant labor pool is more than two or three standard deviations, then the hypothesis that promotions were made without regard to race would be suspect.[11] The City presented uncontradicted evidence that the difference between the expected percentage of minority engineers and the actual percentage of minority engineers was 8.7 standard deviations, and the difference between the expected percentage of minority captains and the actual percentage of minority captains was 3.96 standard deviations. R.80 (Chicago Fire Fighters) Supplemental Aff. ¶¶ 2, 4. "[A] range of four to five standard deviations corresponds to a probability range of 1 chance in 15,786 to 1 chance in 1,742,160." *Ottaviani v. State Univ.*, 875 F.2d 365, 372 n.7 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Thus, the odds that the

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[11] *See Hazelwood*, 433 U.S. at 309 n.14; *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977); *Chicago Miniature Lamp Works*, 947 F.2d at 300 n.4. Helpfully, the Second Circuit recently explained that

> [s]tandard deviation analysis measures the probability that a result is a random deviation from the predicted result—the more standard deviations the lower the probability the result is a random one. Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance. A finding of two or three standard deviations (one in 384 chance the result is random) is generally considered highly probative of discriminatory treatment.

Waisome v. Port Auth., 948 F.2d 1370, 1376 (2d Cir. 1991) (citations omitted). The Supreme Court has cautioned against a bright-line approach to statistical analysis: "We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 n.3 (1988). *But see Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1131 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

disparity among the ranks occurred by chance are in the neighborhood of 1 in 10,000. These numbers reveal disparities "well beyond the possible effect of chance," and therefore support an inference of past discrimination. R.80 (Chicago Fire Fighters) Supplemental Aff. ¶ 2.

The *Chicago Fire Fighters* plaintiffs present several challenges to the use of statistical comparison as evidence of past discrimination. They first argue that the City cannot rely on the statistical comparisons between the labor pools because the City did not consider the statistics when it decided to engage in affirmative action. Because the City did not fashion the remedial relief based on such statistics, in the plaintiffs' view, the City cannot now proffer those statistics as part of its "strong basis" for employing remedial relief. This argument fares no better than the argument that the City's reliance on the litigation history was a "mere afterthought." *See supra,* p. 24. Commissioner Hoskins in fact relied on the minority underrepresentation statistics as one justification for the affirmative action in his letters to Commissioner Galante. R.71 (Chicago Fire Fighters) Ex.E. at 2, Ex.F at 2.

The plaintiffs also suggest that in *Cox v. City of Chicago,* 868 F.2d 217, 222 (7th Cir. 1989), this court concluded that underrepresentation statistics are no longer relevant to disparate impact analysis. They characterize the inquiry here as a disparate impact case and argue that underrepresentation statistics are thus irrelevant to this case. This is not a disparate impact case; the suit brought by the plaintiffs is a section 1983 action based on the constitutional right to equal protection. Again, at this point in the case, we are dealing with the City's defense that it had a "strong basis" for its determination that affirmative action was necessary to remedy prior discrimination. This inquiry—the City's self-assessment of the relevant situation before it—could be analogized to disparate treatment analysis just as well as to disparate impact analysis; the statistics suggest a pattern or practice

of past intentional discrimination as much as they suggest that the past promotion procedures had an adverse impact on minorities. In reality, the City considered the statistics for neither purpose but, rather, as evidence that the hiring and promotion practices that the DOJ challenged in the 1970s and early 1980s had not yet been remedied.[12] Thus, the City's reliance on underrepresentation statistics as part of its "strong basis" for concluding that remedial action was necessary is not inconsistent with *Cox*.

The plaintiffs next argue that the district court should have narrowed the comparative labor pools by considering only the persons in each preceding rank who are eligible for promotion. Particularly, plaintiffs suggest that the relevant labor pools are those firefighters who actually took the 1985 engineer examination and those lieutenants who actually took the 1986-87 captain examination, rather than the complete firefighter and lieutenant ranks. In support of this argument, plaintiffs again draw an analogy to *Cox*, in which statistics were used to illustrate the discriminatory effect of the City's promotion mechanism, specifically the "captain rule," which states that only candidates who have passed the captain examination are qualified to take the battalion chief exam. 868 F.2d at 219-20. In *Cox*, this court held that the proper comparative labor pool was not the pool of all lieutenants

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[12] In his letters to Commissioner Galante, Personnel Commissioner Hoskins followed his recitation of the underrepresentation statistics with an explanation of the litigation history. *See supra* note 9. Immediately following the litigation history, Commissioner Hoskins concluded:

> Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is needed to correct the effects of such a long history of discrimination. Further affirmative action is therefore necessary.

R.71 (Chicago Fire Fighters) Ex.E. at 2, Ex.F. at 2.

but, rather, the pool of lieutenants who had sufficient experience to be eligible for promotion to battalion chief. *Id.* at 221-22. However, as the City notes, *Cox* is not analogous on this point because the comparisons there were made to illustrate the disparate impact of the promotion hurdle which separated the two groups. Here, as just discussed, the comparisons are made to show that the current upper ranks in the CFD remain affected by *prior* discrimination. More fundamentally, evidence in this case suggests that the minority representation among those eligible for promotion to engineer and captain was diluted by prior discrimination; therefore, the comparison between complete ranks is a more appropriate measure of past discrimination.[13]

(iv) adverse impact of the 1985 engineer examination

Finally, the City contends that the adverse impact of the 1985 engineer examination contributed to its compelling governmental interest in affirmative action. After comparing the passing rates for white, black, and Hispanic firefighters, the City concluded that the examination taken as a whole—including the written exam as well as the practical exam—had an adverse impact. In drawing this conclusion, the City relied upon the Uniform Guidelines on Employee Selection Procedures, which contain a bright-line "four-fifths" test for determining whether a scored examination has an adverse impact when used as a selection procedure:

> A selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be re-

[13] The plaintiffs also contend that the district court improperly shifted the burden of proof to them. We find the court's allocation of the burden of proof in harmony with the principles that govern an affirmative action case. *See supra* note 7 and accompanying text.

> garded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4(D) (1978).[14]

The engineer examination consisted of two parts. The first part was a written exam, which was administered on January 19, 1985. The raw scores of this test revealed that it had a severe adverse impact under the four-fifths rule. To counteract this, the City "standardized" the scores by converting the mean scores and standard deviations of the white, black, and Hispanic groups of test-takers to a single mean and standard deviation. The City then set a passing score which allowed the top 617 test-takers to pass. This procedure lessened the adverse impact of the written test.[15]

Those who passed the written examination were eligible to take the practical examination. A few chose not to. The results of the practical examination, when considered separately from the results of the written test, did not

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[14] In 1978, several federal agencies, including the Equal Employment Opportunity Commission (EEOC), the Department of Labor, the Civil Service Commission, and the Department of Justice simultaneously adopted these Guidelines.

[15] The relevant numbers for the standardized written test are:

Race	White	Black or Hispanic	Total
Applied	817	348	1165
Passed Written	454	163	617

Joyce Aff., R.71 (Chicago Fire Fighters), ¶ 10; R.76 (Chicago Fire Fighters) Ex.11 "Data Summary". The white success rate was .56 (454/817), while the black and Hispanic success rate was .47 (163/348). Comparatively, the success rate for blacks and Hispanics was greater than four-fifths (4/5) (or eighty percent) of the rate for whites: .47/.56 = 4.2/5 or .84. Thus, the written examination, after standardization, did not have an adverse impact when used as a pass/fail means of evaluation.

reveal an adverse impact.[16] The City drew up a rank-order eligibility list, calculating rank scores from the practical examination scores (90%) and seniority (10%). On June 5, 1986, the CFD promoted the fifty top-ranked firefighters to engineer. Breaking down these fifty promotions into racial groups and comparing the numbers with the numbers of persons who took the practical exam, the City noted that the success ratio for blacks and Hispanics was more than four-fifths that of the success ratio for whites, and thus the rank-order promotion did not have an adverse impact. On December 25, 1986, the CFD promoted thirty-three more firefighters to the rank of engineer. This time, however, when the numbers of persons of each race promoted were compared with the numbers who took the practical, an adverse impact was evident. But, if the two groups of promoted firefighters were *pooled together* for comparison with the group that took the practical, there was no adverse impact. On this basis, the rank-order promotion was approved.

Nevertheless, the City realized that, beginning with the third set of promotions, the use of the eligibility list for rank-order promotions would have an adverse impact: when either the third group of promotions or the pool of all three groups of promotions were compared with the group of firefighters who took the practical examination,

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[16] The relevant numbers for the practical exam are:

Race	White	Black or Hispanic	Total
Took Practical	410	147	557
Passed Practical	357	111	468

Joyce Aff., R.71 (Chicago Fire Fighters), ¶ 10. The white success rate was .87 (357/410), while the black and Hispanic success rate was .76 (111/147). Comparatively, the success rate for blacks and Hispanics was greater than four-fifths (4/5) (or eighty percent) of the rate for whites: .76/.87 = 4.4/5 or .87. Thus, the practical examination, considered in isolation from the written examination, would not have an adverse impact if it were used as a pass/fail means of evaluation.

the numbers revealed that the practical examination had an adverse impact when used as a rank-order device. Furthermore, when the written and practical portions of the 1985 examination were considered together, the calculations revealed that the overall examination had an adverse impact.[17] This adverse impact of the overall examination means that even if the eligibility list were used as a pass/fail promotion device—for example, if names form the list were drawn randomly for promotion orders—the use of the list would have an adverse impact. The City thus argued that, with this information available, it had reason to believe that promoting from the 1986 engineer eligibility list in strict rank order would be discriminatory and could subject it to Title VII liability. The district court agreed. *See Chicago Fire Fighters,* 736 F. Supp. at 931.

The plaintiffs concede that the statistics reveal evidence of adverse impact. Nevertheless, they argue that such evidence only begins the inquiry. The examination cannot be declared discriminatory unless it is *not* job-related, and the plaintiffs maintain that the simulator (or hands on) portion of the exam was clearly job-related. In *Cox* we noted that, once a device is found to have had an adverse impact, the focus shifts to whether the challenged promotion device is job-related. 868 F.2d at 222 n.3. As one

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[17] The relevant numbers for the overall examination are:

Race	White	Black or Hispanic	Total
Applied	817	348	1165
Passed Practical	357	111	468

Joyce Aff., R.71 (Chicago Fire Fighters), ¶ 10. The success rate for whites was .44 (357/817), while the success rate for blacks and Hispanics was .32 (111/348). Comparatively, the success rate for blacks and Hispanics was thus less than four-fifths (4/5) (or eighty percent) of the rate for whites: .32/.44 = 3.6/5 or .73. Thus, the examination as a whole had an adverse impact on black and Hispanic firefighters.

court commented, "a prima facie case is established by a showing that an examination has an adverse racial impact on minority candidates. Thereafter, legitimate, job-related explanations for differences in score distributions become relevant to rebut the prima facie showing of adverse racial impact." *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 224 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985). In response, the City submits that neither the practical nor written parts of the examination were properly validated as job-related.[18] The City also points to expert testimony in the record to support its contention that the examination could not have been validated. R.71 (Chicago Fire Fighters) Barrett Aff. ¶¶ 16, 17; *Chicago Fire Fighters*, 736 F. Supp. at 931. Thus, the City had a basis for concluding that the 1985 engineer examination had an adverse impact on black and Hispanic firefighters, especially when used as a rank-order device. This evidence contributes to the "strong basis" which the City seeks to establish for its remedial action in this case. *See Croson*, 488 U.S. at 500 (a "strong basis in evidence" supporting "remedial action" may be shown by something "approaching a prima facie case of constitutional or statutory violation").

The City presents the four grounds we have just discussed to establish that it had a "strong basis" for its conclusion that racial discrimination pervaded hiring and promotion practices at the CFD and that, consequently, it has a compelling interest in taking remedial action. The City's evidence with respect to some of the bases may be stronger, from a quantitative or qualitative point of view, than it is with respect to others. The district court

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[18] *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1049 (7th Cir. 1991) ("[A]n employment practice that results in a disparate effect on a protected group might still survive Title VII if it is sufficiently job-related to constitute a business necessity."); *see also* 29 C.F.R. §§ 1607.5, 1607.14 (Guidelines' directives for validation).

was on solid ground, however, in holding that, when evaluated in the aggregate, the evidence establishes that there is no genuine issue of material fact as to whether the City had a strong basis for concluding that the personnel structure of the CFD was a product of racial discrimination.[19]

b. narrowly tailored

In addition to having a compelling governmental interest for remedial action, the remedy chosen must be narrowly tailored to accomplish its purpose. *Croson*, 488 U.S. at 507; *Paradise*, 480 U.S. at 171 (plurality); *Wygant*, 476 U.S. at 280 (plurality); *Cygnar v. City of Chicago*, 865 F.2d 827, 838 (7th Cir. 1989). The purpose of the affirmative action promotions was "to address the problem caused by the city's past discrimination in hiring and promotion: the low percentage of Black and Hispanic captains and engineers" and "to comply with the long-term goal of the consent decree." Appellee's Br. at 37. As we assess the propriety of the City's affirmative action,

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[19] Relying on selected language in *Croson*, the *Chicago Fire Fighters* plaintiffs maintained that the City's affirmative action was invalid because it was not *legislatively* enacted. We need not discuss this issue because the plaintiffs never raised it squarely before the district court. It is axiomatic that an appellant cannot present an argument for the first time on appeal, and therefore the plaintiffs' legislative-enactment argument is waived. *See, e.g., Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990) ("any arguments in opposition to summary judgment not properly raised in the district court are waived"). In any event, we note that the determination that past discriminatory conduct required these remedial measures was made by those officers of municipal government charged with the responsibility for compliance with the settlement order and other orders of the federal courts. Finally, we note that the collective bargaining agreement between the Union and the City requiring the City to comply with the decrees and agreements reached in court was enacted as an ordinance of the City. We deal here with an effort to remedy identifiable racial discrimination in a specific institution (the CFD) in a specific municipality (Chicago). Chicago's public officials were remedying Chicago's problem—not an amorphous societal problem.

we are mindful that "the 'tailoring' requirement is to be interpreted both carefully and flexibly, for there is no universal answer to the problem of remedying racial discrimination." *Donaghy v. City of Omaha,* 933 F.2d 1448, 1461 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 938 (1992). As the Supreme Court has recently confirmed in *Croson,* 488 U.S. at 507, in determining whether race-conscious remedies are narrowly tailored, we utilize several factors, including (1) "the necessity for the relief and the efficacy of alternative remedies"; (2) "the flexibility and duration of the relief, including the availability of waiver provisions"; (3) "the relationship of the numerical goals to the relevant labor market"; and (4) "the impact of the relief on the rights of third parties." *Paradise,* 480 U.S. at 171 (plurality); *see Stuart v. Roache,* 951 F.2d 446, 454-55 (1st Cir. 1991), *petition for cert. filed,* No. 91-1516 (Mar. 20, 1992); *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1447 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 248 (1990); *Howard v. McLucas,* 871 F.2d 1000, 1008 (11th Cir.), *cert. denied,* 493 U.S. 1002 (1989). After reviewing the record, we believe that the district court correctly determined that "the City's policy of affirmative action promotions was narrowly tailored to serve its remedial ends." *Chicago Fire Fighters,* 736 F. Supp. at 932.

First, with regard to the necessity for the relief and the efficacy of alternative remedies, Personnel Commissioner Hoskins noted in his 1987 letters to Fire Commissioner Galante that the decision to pursue affirmative action promotions was arrived at "only after concluding that no other approach would permit meaningful affirmative action progress." R.71 (Chicago Fire Fighters) Ex.E at 3, Ex.F at 3. Because promotions to the rank of engineer and captain are made from the ranks immediately beneath those ranks, some race-neutral procedures for increasing minority representation, such as aggressive recruiting, would not correct discrimination in the upper

ranks. Thus, contrary to the plaintiffs' suggestion, this is not a case like *Croson*, in which the government entity failed to consider any alternatives to race-based relief. *Cf. Croson*, 488 U.S. at 507 ("there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").

Second, the affirmative action was flexible and limited in duration. The promotions were to be made "with the *goal* that 20% of the persons promoted to Engineer would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1, Ex.F at 1 (emphasis added). A goal is by definition "more flexible than an unyielding quota." *Chicago Fire Fighters*, 736 F. Supp. at 932. Furthermore, as the district court noted, under the affirmative action promotions, no unqualified minority had to be offered a promotion. *See Paradise*, 480 U.S. at 177-78 (plurality) (remedy flexible because it required qualified applicants and did not require "gratuitous promotions"). This case demonstrates adherence to that principle. The plaintiffs do not challenge the qualifications of those minority candidates promoted out of rank order. The record also reflects that the affirmative action program was limited in duration. It was designed to last three years or until 350 promotions were made to engineer or 150 promotions to captain. *Cf. Donaghy*, 933 F.2d at 1461 (consent decree narrowly tailored in part because limited to seven years). Indeed, Commissioner Hoskins indicated that the "goals are temporary" and stated that "to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action program goals will be reevaluated on an annual basis." R.71 (Chicago Fire Fighters) Ex.E at 4-5, Ex.F at 4-5. In short, the policies were of limited duration and were annually reviewed.

Third, with regard to the relationship of the numerical goals to the relevant labor market, at issue are the goals

set forth in Commissioner Hoskins' letters to Commissioner Galante on June 16, 1987 (engineers) and July 9, 1987 (captains): "the goal that 20% of the persons promoted . . . would be Black and an additional 5% of those promoted would be Hispanic." R.71 (Chicago Fire Fighters) Ex.E at 1, Ex.F at 1. The district court considered the relevant market to be the members of the ranks from which promotions are drawn: the pools of firefighters and lieutenants in 1987. However, even if we narrow the relevant labor market to the pools of engineers and lieutenants who had passed the recent eligibility tests and made the 1986 (engineer) and 1987 (captain) eligibility lists, the goals of the City were sufficiently related to the labor market. Using this more demanding methodology, of the 557 candidates ranked on the 1987 engineer eligibility list, 112 were black (20.1%), 35 were Hispanic (6.3%), and the remaining 410 were white (73.6%). The engineer promotion goals are clearly realistic in light of the racial composition of this labor market. Of the 341 candidates on the 1987 captain eligibiilty list, 42 were black (12.3%), 15 were Hispanic (4.4%), and the remaining 284 were white (83.3%). There is a disparity between the 12.3 percent of black lieutenants available for promotion and Commissioner Hoskins' announced goal of 20 percent black promotions. While we cannot say that this disparity constitutes the sort of "outright racial balancing" condemned in *Croson*, 488 U.S. at 507, we believe that, in other circumstances, it would deserve more careful scrutiny than that given it by the district court in this case. Here, however, it is clear that the disparity made no difference in the outcome of this litigation. At issue is the October 1, 1987, promotion of twenty-four lieutenants to captain. The first twenty-three of these promotions were made in rank order, including the rank-order promotions of five black lieutenants. Only the twenty-fourth promotion, that of a Hispanic lieutenant who was ranked fortieth, was made out of rank order.

Finally, the impact of the relief on nonminorities is minimal. The affirmative action program did not bar nonminority advancement, nor did it burden unduly nonminority candidates. *See Vogel v. City of Cincinnati*, No. 91-3474, 1992 WL 45451, at *4 (6th Cir. Mar. 13, 1992). As will be discussed in the context of the *Billish* plaintiffs' due process claim, the nonminority candidates were not entitled to rank-order promotion. The CBA provides that promotions will "customarily" be made in rank order, but also requires the City to pursue affirmative action hiring and promotion goals. Arbitrators have interpreted the CBA to permit out-of-rank-order promotions. Furthermore, the plaintiffs do not refute the City's determination that, as of May 1989 (two years after the implementation of the affirmative action promotions), 73% of those promoted from the 1987 captain eligibility list were nonminorities, and 77% of those promoted from the 1986 engineer eligibility list were nonminorities. Thus, the plantiffs' opportunities for promotion have not been denied, but postponed. Postponing a promotion opportunity for qualified nonminorities is less intrusive than denying them any future promotion opportunity.[20] In fact, by September 1988, approximately a year after the promotions in dispute, each of the *Chicago Fire Fighters* plaintiffs not dismissed for lack of

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[20] *See Paradise*, 480 U.S. at 183 (plurality); *see also Howard*, 871 F.2d at 1009-10. Neither is, of course, as intrusive as terminating existing jobs. The plaintiffs suggest that an alternative to the affirmative action promotions would have been a program of incentives to persuade incumbent engineers and captains to retire early. We cannot even assess the propriety of the plaintiffs' argument, however, because the plaintiffs had occasion, and yet failed, to present the argument to the district court for its consideration. The argument cannot now be raised for the first time on appeal. *See, e.g., Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990) ("any arguments in opposition to summary judgment not properly raised in the district court are waived").

standing had been promoted or offered the opportunity for promotion.[21]

Relying on *Croson*, the plaintiffs also contend that the City's affirmative action program could not be narrowly tailored because the beneficiaries under the program had not been identified as victims of past discrimination. In the plaintiffs' view, an individual beneficiary of an affirmative action program must have personally been a victim of the past discrimination that is being remedied. *Croson* faulted the City of Richmond's affirmative action plan because "there [was] no inquiry into whether or not the particular [minority business] seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." 488 U.S. at 508. The plaintiffs contend that the district court erred by not inquiring "whether any minority group member who would be awarded a preferential promotion[] to Engineer or Captain had been the victim of past discrimination." Appellants' Br. at 44-45.

After a careful review of the *Croson* decision, as well as opinions of this and other circuits, we cannot accept the plaintiffs' contention that *Croson* requires affirmative action plans to be limited to identifiable victims of the precise past discrimination that is being remedied. The Supreme Court's demand in *Croson* for an "inquiry into whether or not the particular [minority business] seeking a racial preference has suffered from the effects of past discrimination by the city" cannot be read without reference to the particular factual setting of the case. 488

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[21] Plaintiffs Craven, Duber, and Anderson were promoted to engineer and plaintiff Fischer was promoted to captain effective May 1, 1988. R.71 (Chicago Fire Fighters) Ex.N Personnel Order of April 22, 1988. Plaintiffs Lewandowski and Muir were promoted to engineer effective July 1, 1988. R.71 (Chicago Fire Fighters) Ex.N Personnel Order of June 22, 1988. Plaintiff Kammerer waived an offer of promotion to engineer on July 29, 1988, and plaintiff Anoman waived an offer of promotion to engineer on September 2, 1988. R.71 (Chicago Fire Fighters) Stensland Aff. ¶ 21.

U.S. at 508. The City of Richmond adopted an affirmative action plan that required contractors awarded city construction contracts to subcontract 30% of the dollar amount of each contract to Minority Business Enterprises (MBEs). An MBE was defined as a business from *anywhere* in the United States that was at least 51% owned by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. *See* 488 U.S. at 469-70. The Court concluded that the plan was not narrowly tailored because, in part, Richmond had never identified the prior discrimination it was attempting to remedy. MBEs were defined so broadly that the potential beneficiaries included ethnic groups that may never have been represented in the City of Richmond. Therefore, the plan was simply too broad to be *remedial*. *See id.* at 506-08. The factual context of *Croson* thus suggests that the Court was concerned that affirmative action programs be narrowly tailored enough to remedy only proven local discrimination, rather than attempting to remedy "societal discrimination."

Similarly, the jurisprudential context in which *Croson* was decided confirms that the Court did not intend to overturn its prior approval of "race-conscious" relief programs that are not necessarily individual-victim conscious. It must be remembered that the Court has said specifically that affirmative action plans need not benefit only identifiable victims. In *Local 93, International Association of Fifefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986), a Title VII case, the Court held that "voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." This principle, expressed many times by the Supreme Court,[22] was re-

[22] *See also United States v. Paradise*, 480 U.S. 149, 166 (1987) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject

iterated in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), by Justice O'Connor—the author of the *Croson* majority opinion—when she wrote that, with respect to the tightness of the means-end fit, "the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.* at 287 (concurring opinion). Justice O'Connor also stated that "[t]he Court is in agreement that . . . remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Id.* at 286. Furthermore, Justice Powell, writing for Chief Justice Burger and Justices Rehnquist and O'Connor, noted that "[public schools] are under a clear command from this Court . . . to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary." *Id.* at 277. Justice Powell also noted that, "in order to remedy the effects of prior discrimination, it may be necessary to take race into account." *Id.* at 280.

Croson did not question the continuing validity of these cases. *Croson* focused on the fact that the Richmond plan potentially benefitted minority businesses from all across the country, including businesses owned by minority groups against whom there was no evidence of discrimination in Richmond. Thus, it is not surprising that the majority of circuits that have addressed

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to discrimination.") (plurality); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 480 (1986) ("We have consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination.") (plurality) (citing *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986), *Fullilove v. Klutznick,* 448 U.S. 448 (1980), *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971)).

this issue, including this circuit, have read *Croson* to require that, for an affirmative action program to be considered narrowly tailored, there must be a showing of prior discrimination against the racial or ethnic *group* that benefits under the program. In *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991), the Ninth Circuit upheld a plan which benefitted groups that had suffered discrimination:

> [T]he plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest.

The court specifically addressed the argument at issue:

> We find [the plaintiff] unlikely to prevail on its argument that tailoring the remedy to specific minority groups is insufficient to meet constitutional requirements, and that to pass constitutional muster any remedy adopted must provide redress only to specific individuals who have been identified as victims of discrimination. To reach any other decision would thwart the Supreme Court's directive in *Croson* that race conscious remedies may be permitted in some circumstances. As pointed out by the district court, "an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous."

Id. at 1417 n.12 (citations omitted). In *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992), the Eleventh Circuit contrasted the affirmative action plan under scrutiny with the Richmond plan struck down in *Croson*: "However, the over-inclusiveness at issue in *Croson* is not present in our case, since Metro Dade is not offering

hiring preference to any groups, e.g., Aleuts or Eskimos, against which no discrimination has been found." *Id.* at 1409 n.37 (separate opinion of Judge Brown). In *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992), the Eighth Circuit found a remedial consent decree not over-inclusive because "the consent decree's interim and long-term goals applied only to blacks, the minority group identified as being underutilized." In *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990), the Tenth Circuit held that "[t]he purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination." And the Eleventh Circuit observed that

> the Richmond plan was not 'narrowly tailored' to remedy past discrimination in Richmond's construction industry because the set-aside requirement applied equally to African-Americans, Hispanics, Indians, Eskimos, and Asians, in spite of the fact that some of those groups were not represented in Richmond. The Richmond plan thus did more than remedy past discrimination, it benefitted groups against whom there may have been no discrimination.

Cone Corp. v. Hillsborough County, 908 F.2d 908, 917 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990). Similarly, this circuit, speaking through Judge Posner, has held that "*Croson* holds that the Equal Protection Clause forbids states and municipalities to discriminate in favor of blacks and other minorities unless the discrimination is necessary to rectify discrimination against the favored groups." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421 (7th Cir.), *cert. denied*, 111 S. Ct. 2261 (1991); *see id.* at 421-22 ("And a majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities,

unless the purpose is to provide a remedy for discrimination against the favored group.").[23] Thus, we conclude that *Croson* demands only that there be a showing of prior discrimination against the racial or ethnic *group* that benefits under the program, not the individual beneficiaries. As previously determined, in this case the City has justified its affirmative action promotions by demonstrating that the groups that benefitted—blacks and Hispanics within the CFD—were the victims of past discrimination.[24]

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[23] *But see Shurberg Broadcasting v. FCC*, 876 F.2d 902, 910 (D.C. Cir. 1989) (concurring opinion), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Winter Park Communications v. FCC*, 873 F.2d 347, 367-68 (D.C. Cir. 1989) (concurring opinion), *aff'd and remanded sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *see also Coral Constr. Co. v. King County*, 941 F.2d 910, 924 (9th Cir. 1991) (finding "case-by-case utilization goals" to be "less problematic" insofar as they "insure that the beneficiaries of such preferential treatment are those 'who truly have suffered the effects of prior discrimination'" (quoting *Croson*, 488 U.S. at 508)), *cert. denied*, 112 S. Ct. 875 (1992).

[24] Arguably, relief programs that only target individual victims of past discrimination do not employ racial classifications, do not discriminate among similarly-situated individuals based upon race, and thus are not truly "race-conscious." Such programs take race into account, if at all, only as a means of confirming victim status. Thus, if the *Croson* majority intended to restrict remedial programs to only those that benefit identifiable individual victims of past discrimination, it would be inconsistent with the Court's prior recognition of the need for "race-conscious" remedial relief in certain circumstances. *See Croson*, 488 U.S. at 518-19 (Kennedy, J., concurring in part and concurring in the judgment) ("The rule suggested in [Justice Scalia's] opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the need for courts to pass upon each racial preference that is enacted. . . . His opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race. Nevertheless, given that a rule of automatic invalidity for racial preferences would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point.")

Even if, as it is argued, *Croson* did require that an affirmative action program benefit only identifiable victims of the past discrimination it seeks to remedy, we would uphold the program under review in this case. We have already concluded that the City has provided substantial evidence that there was prior discrimination against blacks and Hispanics in the CFD's hiring and promotion procedures; from 1973 through 1980, the Justice Department challenged the CFD's hiring and promotion practices as discriminatory against blacks and Hispanics. Each beneficiary of the affirmative action promotions is employed within the ranks of the CFD, a specific, identified body infected by the ills of past discrimination. In 1987 there remained a significant statistical disparity between the ranks.[25] The minority membership of the lower ranks was still underrepresented in the upper ranks. Minority lieutenants still suffered the isolating effects of past discrimination, and, even if there was no barrier to entry at the firefighter level, minority firefighters still encountered the frustration of a discriminatory promotion system and of working under leadership that was the product of that system. Therefore, every one of the beneficiaries of the affirmative action practices challenged in *Billish* and *Chicago Fire Fighters* suffered at least the

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[25] According to Department of Labor work force participation figures, in 1980 the Chicago work force was 33% black and 13% Hispanic. R.71 (Chicago Fire Fighters) Joyce Aff. ¶ 15. As of June 30, 1987, the racial composition of the CFD was as follows:

Rank	Total	Black	Hispanic	Percentage Black or Hispanic
Battalion Chief	97	1	1	2.0%
Captain	194	5	2	3.6%
Lieutenant	646	68	20	13.6%
Engineer	464	44	7	11.0%
Firefighter	2739	638	161	29.2%

R.71 Stensland Aff. ¶ 19.

general effects of the past discrimination that the CFD was seeking to remedy.

More specifically, the evidence suggests that the beneficiaries of these programs suffered particular effects of past discrimination in CFD hiring and promotion. The beneficiaries of the practices challenged in *Chicago Fire Fighters* were a group of black firefighters who were promoted to engineer before the plaintiff firefighters, and one Hispanic lieutenant who was promoted to captain before the plaintiff lieutenants. All of the beneficiaries were promoted out of rank order.

With respect to the black firefighters, they had ranked lower than the white firefighters on the 1986 engineer eligibility list because of their performance on the 1985 engineer examination. The district court found that this examination was discriminatory insofar as it "had an adverse impact on minority candidates when used as a rank order device." 736 F. Supp. at 931. As discussed above, *see supra* pp. 30-34 [46a-51a], there was substantial evidence to support the district court's finding. Thus, the black firefighters who were beneficiaries of the affirmative action plan were not only general victims of past discrimination, they were specific victims of the adverse impact of the 1985 engineer examination.

With regard to the Hispanic lieutenant, he was promoted from the 1987 captain eligibility list out of rank order. This list was compiled from results of the 1986-87 captain examination which, unlike the 1985 engineer examination, was adjusted to dissipate any adverse impact. Thus, the Hispanic lieutenant cannot claim to be a victim of any discriminatory impact of the 1986-87 captain examination. Nevertheless, the evidence suggests that the Hispanic lieutenant was a victim of past discrimination in the 1978 promotion examinations. From the October 1, 1987, promotion order and the 1987 captain eligibility list, one can deduce the name of the Hispanic

lieutenant and the fact that he has served in the CFD since July, 1977. R.71 (Chicago Fire Fighters) Ex.N at 7, Ex.M at 1. In order to be promoted from firefighter to lieutenant, he had to take and pass a promotion exam for lieutenant [26] at some point between July 1977, when he was hired, and September 1987, when he sat for the first portion of the captain exam. His first opportunity would have been the 1978 set of promotion exams, which were discriminatory.[27] His next opportunity would not have been until after the engineer exam in 1985.[28] The first

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[26] Firefighters may become lieutenants directly—without spending time as an engineer.

[27] In 1978, the Department of Personnel prepared and administered new promotion exams for each rank in the CFD. R.71 (Chicago Fire Fighters) Cole Aff. at ¶ 11. In early 1980, the Justice Department advised the City that it intended to file suit to challenge the 1978 set of promotion exams "on the grounds that they had severe adverse impact against minority candidates." *Id.* at ¶ 13. After meetings between the Justice Department and the City, the attendees concluded that the exams had a severe adverse impact on minority candidates. Based upon the strength of the Justice Department's case, the projected cost to the City of defending the lawsuit, and the City's "belief that the promotion processes had been unfair to Black and Hispanic members of the Chicago Fire Department," the City decided to enter into the 1980 consent decree.

[28] Counsel for the City of Chicago told the district court that testing and listing are done from the bottom to the top: engineer first, lieutenant second, captain third, and battalion chief last. Counsel also told the district court that the 1985 test was the first engineer examination since 1978. Counsel said to the district court,

> It is true that the current generation of Fire Department lists, firefighter, engineer, lieutenant, captain, battalion chief stayed up a long number of years. They were—the lists were posted in 1979. I believe some of the tests were given in 1978.
>
> The engineer list was the first to go down. It went down with a new test in 1985. We've been working our way up the ladder. Engineer was first. Lieutenant was second. Captain third, and we'll be giving battalion chief tests. The reason that

promotions from the 1985 engineer eligibility list, which was produced by the 1985 engineer test, were not made until June 5, 1986 and the first promotions from the new lieutenant eligibility list could not have been any earlier.[29] The promotion orders from June 5, 1986 through September 1987 include only one set of promotions to lieutenant—the December 25, 1986 Personnel Order—and the Hispanic lieutenant at issue is not named on that order. R.71 (Chicago Fire Fighters) Ex.N at 2-3. Thus, from the evidence available in the record, it is reasonable to conclude that the Hispanic lieutenant must have taken the 1978 lieutenant exam and suffered its specific discriminatory effects: he was ranked lower on the 1979 lieutenant eligibility list than he would have been on a fair test. A lower rank meant a delayed promotion to lieutenant and less experience as a lieutenant before he took the 1986-87 captain exam. To the extent that the lack of experience translated into a poorer performance on the 1986-87 captain exam and thus a lower ranking on the 1987 captain eligibility list, the challenged action of promoting him to captain out of rank order provided a direct remedy of the effects of prior discrimination.[30]

Given this record, we agree with the district court that "there is no genuine issue of material fact that the City's

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this list—the length of time these lists have been up is out of the ordinary and not something the City intends to repeat.

Tr. of Oct. 14, 1987, R.171 (Billish) at 11-12. Thus, it appears that the next lieutenant exam was not until after the engineer exam was given in 1985.

[29] Compare the top scoring firefighters on the 1986 engineer eligibility list, R.71 (Chicago Fire Fighters) Ex.L, with the first firefighters promoted on June 5, 1986, R.71 (Chicago Fire Fighters) Ex.N.

[30] While the district court did not consider this method of handling the narrowly tailoring analysis, we note that "an appellate court may affirm on any ground that finds support in the record." *Roland v. Langlois*, 945 F.2d 956, 962 n.11 (7th Cir. 1991).

affirmative action goals at issue here were narrowly tailored to their remedial purposes." *Chicago Fire Fighters,* 736 F. Supp. at 933. In sum, the City had a compelling governmental interest, justifying its affirmative action program, and the program was narowly tailored to accomplish its purpose.

C. *Billish v. City of Chicago*

1. Facts

The *Billish* case involves promotions from the 1979 captain eligibility list. As we already have noted, the City administered an examination for the rank of captain in the CFD during 1978-79. The examination consisted of a written test, an oral test, and an efficiency grade. Each of the three parts was graded separately, weighed, and averaged for a final score. In 1979, the City posted the results of the exam and listed the lieutenants in rank order on an eligibility list. Each of the plaintiffs passed the examination and was ranked between numbers 245 and 281.[31] The City began making promotions from the eligibility list in rank order. Of the 298 persons who scored above the passing score of 70, 13 were minorities. Shortly after the posting of the eligibility list, the district court entered the 1980 settlement order, and the City and Union entered the CBA described previously.

In August 1983, Fire Commissioner Galante requested that a new examination be developed and administered for each of the ranks from firefighter to battalion chief because the 1979 eligibility lists were still in place. In March 1985, the last minority lieutenant was a score above 70 on the 1979 captain eligibility list was promoted. In the fall of 1986, the first part of a two-part captain examination was given. On December 25, 1986,

[31] The City maintains that the *Billish* plaintiffs scored from 239 to 281. In its answer to the plaintiffs' complaint, however, the City admits that the plaintiffs' rankings are correct. Therefore, we accept the plaintiffs' representations of their relevant scores.

before the City had completed administering the second part of the captain examination, Commissioner Galante issued a promotion order for several ranks of the CFD. The promotions were ordered to take effect January 16, 1987. Among those promoted were the eighteen remaining top-ranked persons on the 1979 captain eligibility list, each of whom was white. Commissioner Galante asked the Department of Personnel to identify any minorities that remained on the 1979 list. Deputy Commissioner of Personnel Robert Joyce reported that there were two minority lieutenants remaining on the list, but, because they had scored below the cut-off score of 70, the Personnel Department would have to lower the cut-off score to make them eligible for promotion. Precedent existed for such an action; passing scores for other ranks had been lowered. R.44 (Billish) Ex.A ¶ 6. Deputy Commissioner Joyce determined that the scores (64.17 and 56.69) and experience of the two minority lieutenants were sufficient to consider them qualified for promotion to captain. He testified that, because passing scores involved administrative factors such as the number of anticipated promotions, "failure to achieve the cut-off score does not mean that a candidate is necessarily unqualified for promotion." *Id.* ¶ 4. Accordingly, on January 12, 1987, Commissioner of Personnel Hoskins authorized lowering the cut-off score to make the two minority lieutenants eligible for promotion. On January 13, Commissioner Galante ordered the promotion of the two lieutenants effective January 16, the same date the December 25 promotions were effective.

By May 1987, the second half of the captain examination had been administered but the captain eligibility list had not yet been drawn up. Commissioner Galante needed five additional captains and inquired of Personnel Commissioner Hoskins when the new captain eligibility list would be ready. Commissioner Hoskins reported that the new list would be ready in approximately thirty to sixty days. Based on this report, Commissioner Galante decided to wait for the new list rather than draw from the

1979 list. On July 13, 1987, Commissioner Hoskins canceled the 1979 eligibility list and made the 1987 eligibility list effective. Each of the nine plaintiff lieutenants had passed the exam and were among those ranked on the list. On October 1, 1987, the first promotions from the 1987 list were made when twenty-four lieutenants were promoted to captain. These promotions included eighteen whites, five blacks, and one Hispanic. None of the plaintiffs—highest-ranking of whom was forty-first on the new list—was among the twenty-four promoted. The plaintiffs note, however, that, had the promotions come from the 1979 eligibility list, each of them would have been promoted.[32]

On October 7, 1987, the plaintiffs filed a two-count complaint, under 42 U.S.C. § 1983, against the City and Commissioner Galante. The plaintiffs challenged the lowering of those scores and the subsequent promotions, as well as Commissioner Galante's May 1987 refusal to draw

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[32] Soon after the City promoted the two minority lieutenants from the 1979 eligibility list, the Union filed a grievance. The Union alleged that the City breached the CBA by promoting the two minorities out of rank order and lowering their passing scores. The matter went to arbitration. The arbitrator determined that the City's motivation for promoting the two lieutenants was to comply with the affirmative action directives of the district court's 1980 settlement order as well as the affirmative action goals contained in the CBA. R.44 (Billish) Ex.B at 26-27. The arbitrator concluded that the City had met its "heavy burden" of justifying promotions out of rank order and lowering the passing scores. The arbitrator noted that the 1980 settlement order specifically authorized lowering the passing score for engineers and lieutenants. Moreover, both minority lieutenants were qualified in the arbitrator's view. From a contractual standpoint, the arbitrator determined that the CBA had not been violated by the promotions. He reasoned that the CBA explicitly grants to the City the unilateral right to make inherent managerial policy concerning minimum qualifications for all ranks. This unilateral authority, combined with the affirmative action mandate contained in the CBA, convinced the arbitrator that the City had the right to make the promotions. *Id.* at 30-31.

further from the 1979 captain eligibility list. Count I alleged that the promotions of the two minorities deprived the plaintiffs of their right to promotion to captain without due process of law. Count II alleged that the defendants refused to promote the plaintiffs solely because of race, in violation of the Equal Protection Clause. The City moved for summary judgment on both counts. In separate opinions, the district court granted both motions.

2. Due process claim

As the district court noted, a due process claim has two components: (1) the plaintiff had a protectible property interest, and (2) he was deprived of that interest without due process of law. Memorandum Opinion and Order of November 28, 1988 (R.46 (Billish)) at 6-7;[33] *see Perry v. Sindermann*, 408 U.S. 593, 599 (1972). To have a constitutionally protected property interest the plaintiffs "must have more than a unilateral expectation." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Instead, they must "have a legitimate claim of entitlement." *Id.* The Constitution does not create property interests; the plaintiffs must find their property interests in sources such as state law, existing rules, or mutual understandings. *Id.* "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Sindermann*, 408 U.S. at 601. As the district court also noted, the crux of the plaintiffs' argument is that they had a property interest in being promoted from the 1979 captain eligibility list based on the City's custom and practice of filling all vacancies before retiring an eligibility list and promoting individuals in rank order as vacancies occur. The court considered statutes, rules, ordinances, the City's Personnel Rules, and the CBA between the par-

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[33] *See Billish v. City of Chicago*, No. 87 C 8731, 1988 WL 130003 (N.D. Ill. Nov. 28, 1988).

ties, but found nothing to serve as a sufficient basis for a protected property interest.

On appeal, the plaintiffs draw our attention to the text of the CBA as the source of their property interest in rank-order promotion.[34] Specifically, the plaintiffs point to the language in Article IX, paragraph 9.3B(2)b, which provides: "No employee shall be promoted from a new promotion list until all employees who may have been passed over on a previous promotion order have been promoted." R.25 (Billish) Ex.D.[35] According to the

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[34] The City contends that the plaintiffs waived these arguments because they never presented them to the district court. As the district court explains, R.46 (Billish) at 1-4, the plaintiff's failure to present argument to the court was a result of the court's rejection of their late response to the motion for summary judgment. The district court did reach the merits, however, and it considered arguments for the plaintiffs' case which it extrapolated from the complaint. We therefore address these arguments on appeal.

[35] In full, section 9.3B reads:

> Section 9.3B Promotional Eligibility Lists
>
> 1. The ranking of employees on promotional lists shall be based upon the employee's ascertained merit which shall be determined by promotional examinations consisting of the following three criteria: written, seniority and oral proficiency.
>
> The weights to be accorded the criteria included herein shall be consistent with the requirements of Federal Law and shall be subject to review by the Justice Department.
>
> 2. Promotional vacancies shall be filled by the Commissioner from eligible employees certified from the applicable promotional eligibility list. Employees shall be certified for promotion in order of their rank on the list. The employees certified for promotion shall be the five employees having the highest scores (rank) for each position to be filled, but in no event more than fifteen employees more than the number of vacancies to be filled. Vacancies will customarily be filled by employees in the order of their ranking on the list. An employee certified for promotion to a vacancy may be passed over for any vacancy on an order subject to the following conditions:

plaintiffs, this agreement formalized a custom and practice of the City to promote in rank order. The district court reasoned that paragraph 9.3B(2)b did not apply because the plaintiffs were not "passed over" within the meaning of the paragraph. Relying on an arbitration decision that construed the paragraph, the court concluded that the plaintiffs' failure to be promoted from the 1979 eligibility list was not the equivalent of being "passed over." R.46 (Billish) at 9-10. The court also reasoned that an individual is passed over within the meaning of the paragraph when that individual "comes up for promotion but [was] not promoted for a particular reason, valid or otherwise." *Id.* at 10. In this case, the court continued, none of the plaintiffs came up for promotion, the entire 1979 eligibility list was canceled and everyone who wished to compete

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a. No employee may be passed over on more than two orders.

b. No employee shall be promoted from a new promotional list until all employees who may have been passed over on a previous promotional order have been promoted.

c. An employee may be passed over on an order only for the following reasons:

   i. At the time the vacancy occurs the employee is on an injury leave of six months or more for a non-duty related injury; provided, however, that upon the employee's return to duty from such leave he shall be promoted on the next order.

   ii. A major disciplinary infraction (i.e. charges re-resulting in a suspension of 15 days or more) ; provided, however, that if such disciplinary infraction is not sustained the employee shall be promoted on the next order. No disciplinary infraction may be used for more than one order as a reason to pass over an employee on a promotional order.

   iii. In order to comply with affirmative action ordered by a court.

The Employer shall specify the specific reason in the event that it decides to pass over an employee on an order.

R.71 (Chicago Fire Fighters) Ex.C. at 15-16.

for subsequent promotions was required to take the new captain examination. Furthermore, again relying on an arbitrator's interpretation, the court concluded that the plaintiffs were not "on an order" as that term is used in section 9.3B. *Id.* at 10-11. Our view of the arbitrator's decision confirms the district court's reasoning. Paragraph 9.3B(2)b applies only to individuals first certified for promotion and placed on a promotion list but later passed over. The plaintiffs were never certified for promotion or placed on a promotion list, therefore they are not "passed over" within the meaning of paragraph 9.3B(2)b.

Plaintiffs also point to the more general language in paragraph 9.3B(2), which states: "[Promotion] [v]acancies will customarily be filled by employees in the order of their ranking on the list." R.25 (Billish) Ex.D. As the district court noted, this general rule is qualified by the language which precedes it, and thus it is properly understood only in context:

> The employees certified for promotion shall be the five employees having the highest scores (rank) for each position to be filled, but in no event more than fifteen employees more than the number of vacancies to be filled. Vacancies will customarily be filled by employees in the order of their ranking on the list.

Id. This reflects the practice testified to by Deputy Commissioner Joyce: after the First Commissioner tells the Personnel Department that he would like to promote *x* number of lieutenants, the Personnel Department prepares and sends to the Commissioner a list of *x*-plus-five-to-fifteen names from which to choose. Plaintiff-Appellant's App. Ex.W at 27. Thus, the rule that "Vacancies will customarily be filled by employees in the order of their ranking on the list" refers to the list of names which the Personnel Department submits to the Fire Commissioner, not the eligibility list. Furthermore, paragraph 9.3B(2)c(ii) states three reasons an employee may be passed over:

c. An employee may be passed over on an order only for the following reasons:

i. At the time the vacancy occurs the employee is on an injury leave of six months or more for a non-duty related injury . . . .

ii. A major disciplinary infraction (i.e. charges resulting in a suspension of 15 days or more)

. . . .

iii. In order to comply with affirmative action ordered by a court.

Id. These exceptions provide the Fire Commissioner some non-rank-order flexibility in choosing from the list he receives from the Personnel Department. When the issue of the Commissioner's discretion was examined in arbitration, the arbitrator reviewed the history of section 9.3B. R.25 (Billish) Ex.B at 13-18. That history reveals the City's long-standing refusal to allow any limits on the Commissioner's discretion and its acceptance of section 9.3B only with the inclusion of the phrase "on an order," which the City understood to limit the Commissioner's discretion only after he drafted a promotion order. The arbitrator concluded that, despite the seemingly restrictive language of section 9.3B, the parties intended that "the Commissioner has at least a degree of discretion to choose from among the candidates listed on the certification list," although the Commissioner could promote out of rank order "only upon reasonable grounds." *Id.* at 41-43. The district court relied upon the arbitrator's findings when it concluded that "the Fire Commissioner has discretion to determine whether and when promotions should be made." R.46 (Billish) at 10-11. After reviewing the CBA and the arbitration opinions, we agree with the district court's conclusion that the Commissioner's discretionary latitude in non-rank-order promotion negates any property interest in

rank-order promotion. *See Stuart v. Roache,* 951 F.2d 446, 455 (1st Cir. 1991) ("[W]here an appointing authority may consider factors in addition to the applicants' ranking on an eligibility list, a police officer's expectation of promotion based on that list will not rise to the level of a 'property interest' entitled to constitutional protection."), *petition for cert. filed,* No. 91-1516 (Mar. 20, 1992).

Finally, the district court found no existence of a custom or practice by the City to fill vacancies for captain from the eligibity list in effect at the time a vacancy occurs. Relying in part on the plaintiffs' own depositions, the court concluded that there was no mutually explicit understanding between the City and the plaintiffs. Indeed, several of the plaintiffs were unable to point to a single instance when all vacancies were filled from an existing list. R.46 (Billish) at 14. Again, we are in agreement with the district court; there is no substantial evidence of such a custom or practice. Thus, we affirm the district court's dismissal of the due process claim; the plaintiffs have presented insufficient evidence to create a genuine issue as to the existence of a property interest in rank-order promotion.

3. Equal protection claim

The district court granted the City's motion for summary judgment on the equal protection claim in a separate opinion and order. Memorandum Opinion and Order of February 16, 1990 (R.60 (Billish)).[36] The court began its analysis by stating that the plaintiffs had the burden of showing that: (1) "the rationale for affirmative action is inadequate;" or that (2) "the specific actions unnecessarily trammel the legitimate interests of non-minorities." R.60 (Billish) at 2-3. Addressing the second prong first, the court concluded that the City could lawfully pursue a

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[36] *See Billish v. City of Chicago,* No. 87 C 8731, 1989 WL 182589 (N.D. Ill. Feb. 16, 1990).

course of affirmative action, and the course pursued in this case did not unnecessarily trammel the rights of the plaintiffs. The plaintiffs were not denied an opportunity to be considered for promotion, the court reasoned; in fact, each of the plaintiffs was on the 1987 eligibility list. Rather, the opportunity to be considered for promotion was simply postponed. *See id.* at 3-4. Furthermore, the court concluded that the plaintiffs could not prove that the City's rationale for the affirmative action was inadequate. The court noted the "significant disparities between minority availability and minority employment at all ranks," the "historical fact" that past hiring and promoting procedures had an adverse impact and were inadequately validated, the existence of prior racially discriminatory performance evaluations, and the DOJ's suit against the City and the ensuing 1980 settlement order. *Id.* at 5. These conditions corroborated the existence of a rational basis for the City's affirmative action. Relying on *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the district court declined to accept the plaintiffs' position that a formal finding of discrimination was required. R.60 (Billish) at 5. The court then held that no equal protection ground existed for challenging the City's decision to retire the 1979 eligibility list. "The City could reasonably conclude that the use of a stale list ought to be deferred where its use would perpetuate effects of past discrimination and increase racial disparities." *Id.* at 6. Finally, the district court distinguished the present case from *Croson* on the ground that, in this case, "the showing was made that the City discriminated against blacks in developing the 1979 list and the remedy neither involved arbitrary quotas nor excluded whites from advancement." R.60 (Billish) at 6 n.7.

The district court applied the wrong standard of scrutiny in its equal protection analysis. The court apparently relied upon an analytical framework which the Supreme Court prescribed for Title VII analysis in *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). As dis-

cussed earlier, a majority of justices in *Croson* held that, under the Equal Protection Clause, race-based remedial programs are subject to strict scrutiny; they must be justified by a compelling governmental interest and be narrowly tailored. *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality). For this reason, we must remand this case to the district court for reconsideration of the *Billish* plaintiffs' equal protection claim.

We acknowledge that there is some authority for simply applying the stricter standard of scrutiny to the record on appeal rather than remanding the case to the district court. *See Eisenbud v. Suffolk County*, 841 F.2d 42, 45-46 (2d Cir. 1988) (even though district court erred in applying rational basis standard, judgment affirmed under intermediate scrutiny); *cf. United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (applying narrow tailoring requirement despite lower courts' use of less rigorous standard, without deciding whether lower court had committed error). As this court has repeatedly stressed, "an appellate court may affirm on any ground that finds support in the record." *Roland v. Langlois*, 945 F.2d 956, 962 n.11 (7th Cir. 1991). We are also aware, however, that appellate courts are careful not to make such a determination if there is need for further analysis or supplementation of the record by the district court. *See, e.g., Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 971 (6th Cir. 1991) (reciting history of remand in light of *Croson*); *Evans v. City of Evanston*, 881 F.2d 382, 385 (7th Cir. 1989) (remanding for further analysis and/or supplementation of the record in light of *Wards Cove*). Here, we believe there are especially compelling reasons to defer to the district court for the initial reassessment. As we have already noted, *Croson* demands that, in cases involving affirmative action programs, courts undertake the narrow tailoring requirement of strict scrutiny analysis with extreme care. 488 U.S. at 493 ("searching judicial inquiry"), 507-511. Chief Judge Tjoflat acknowledged this directive when the

Eleventh Circuit was confronted recently with a similar situation:

> As Croson makes clear, equal protection challenges to affirmative action plans turn on detailed factual evaluations. We, as an appellate court, are ill equipped to make initial factual determinations. Therefore I think it best that we remand appellant's equal protection claim to the district court so that it may decide the merits of this claim. On remand, the district court, which previously resolved this case without the benefit of *Croson*, will be able to analyze the relevant facts extensively. In this way, we ensure that appellant's claim receives full and fair adjudication.

Peightal v. Metropolitan Dade County, 940 F.2d 1394, 1411 (11th Cir. 1991) (Tjoflat, C.J., concurring in part and dissenting in part), *cert. denied*, 112 S. Ct. 969 (1992). Moreover, upon examination of the record in this case, we have substantial misgivings as to whether it is sufficient to support the exacting degree of thorough analysis required by *Croson*. For example, we note that, in its presentation to us, the City has placed great emphasis on the immediate operational need for new captains as justifying the promotion of the two black lieutenants who scored below 70 on the 1979 exam and, in that regard, places great reliance on the deposition and affidavit of Commissioner Galante. However, on inspection, we believe that material leaves a significant question as to whether there was an immediate operational need for two more captains in January 1987. Read as a whole, Commissioner Galante's testimony appears to evidence concern more with immediate minority hiring than with meeting immediate operational needs.

On remand, the district court should reappraise the equal protection claim. Because the compelling governmental interest analysis will be, to a large extent, duplicative of our analysis in *Chicago Fire Fighters*, the prin-

cipal focus should be on whether the challenged actions were narrowly tailored. Given the exacting standard of *Croson,* the district court may well determine that augmentation of the record is appropriate.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court in *Chicago Fire Fighters* (No. 90-2182). In *Billish* (No. 90-1650), we affirm the district court's grant of summary judgment on the due process claim, but reverse and remand the disposition of the equal protection claim for further consideration in conformity with this opinion. The Defendants-Appellees in No. 90-2182 may recover their costs in this court. The Plaintiffs-Appellants in No. 90-1650 may recover their costs.

No. 90-2182—AFFIRMED

No. 90-1650—AFFIRMED in part,
REVERSED and
REMANDED in part

POSNER, *Circuit Judge*, dissenting. The Supreme Court has told us to take state discrimination against as well as in favor of whites with utmost seriousness. Noble intentions—vague gestures at history—the soothing assonance of "affirmative action—are none of them enough. We may permit reverse discrimination only when it is shown to be necessary to rectify past discrimination against nonwhites by the state or city or other state agency that wants to practice reverse discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). This directive precludes our affirming in No. 90-2182 (*Chicago Fire Fighters Union, Local No. 2 v. Daley*), where the district court held that white firemen passed over for promotion had failed even to raise a triable issue of unlawful discrimination. They did that and more. The other case, *Billish v. City of Chicago*, No. 90-1650, is materially identical, and I shall not discuss it separately beyond noting that while I agree that the decision must be reversed, I disagree with the ground. The problem is not that the district judge applied the wrong standard on summary judgment and should be told to apply the right one, but that the plaintiffs were denied the trial that the correct standard clearly entitles them to.

I admire the thoroughness of the majority opinion but there is a danger of missing the forest for the trees. The essential facts bearing on No. 90-2182 are few and simple. The Department of Justice sued the City in the 1970s, charging that the fire department discriminated against blacks. The suit was settled by the entry of a consent decree in 1980 that required the City to strive to promote minority (i.e., black and Hispanic) firemen to the ranks of engineer and lieutenant in a ratio of 1 minority fireman to 4 white ones. The plaintiffs in our case were not parties to the consent decree and are not bound by it. On the basis of exams given in 1985 and 1986, eligible candidates were ranked and in 1987 the fire chief promoted 80 firemen to either engineer (from

firefighter, the lowest rank) or captain (from lieutenant, the rank in between engineer and captain), of whom 23 were black or Hispanic. Nine of the 23 were promoted out of rank order. That is, they were promoted in place of nine whites who had higher scores on the pertinent exam.

They were promoted only because of their racial (or, in the case of Hispanics, ethnic) identity, and this is racial discrimination. It would be permissible discrimination if, but for discrimination *against* these groups, they would have accounted for 29 percent of the promotions (23 divided by 80) rather than the 18 percent (14 divided by 80) that they would have accounted for had the promotions been made on a nondiscriminatory basis. The majority is impressed by the fact that while 29 percent of the firefighters (the lowest rank) were either black or Hispanic, only 11 percent of the engineers, 14 percent of the lieutenants, and 4 percent of the captains were. But no inference of discrimination can be drawn from these statistics. If the number of black and Hispanic firefighters had been growing relative to the number of white firefighters, as in fact it had been—the percentage of firefighters who were black or Hispanic had doubled since 1983—one would expect them to be underrepresented in the higher ranks, since there is a waiting period before one is eligible for promotion to those ranks.

If minority firemen had been held back by discriminatory (or perhaps even just excessively long) waiting periods or racially discriminatory tests, or if their original entry into the fire department had been delayed because of racial discrimination, so that they were lower on the career ladder than they would have been had the City never discriminated, the City would be free to depart from the rank order generated by the test results in order to correct the consequences of discrimination by putting things approximately where they would have been but for

discrimination. But there is no evidence of promotion delays or other career delays due to discrimination, or of discriminatory exams. The exams given in 1985 and 1986 had been adopted by agreement between the minority firemen and the City—which by that time had a black mayor whose subordinates discriminated against whites. *Auriemma v. Rice,* 910 F.2d 1449, 1451 (7th Cir. 1990) (en banc); *Cygnar v. City of Chicago,* 865 F.2d 827, 835 (7th Cir. 1989); *United States v. City of Chicago,* 870 F.2d 1256, 1257-58 (7th Cir. 1989); *United States v. City of Chicago,* 894 F.2d 943, 949 (7th Cir. 1990) (concurring opinion). It is implausible either that the City would have demanded exams that discriminated against blacks and Hispanics because it was the—now merely nominal—defendant in the consent proceeding or that the minority firemen would have knuckled under to such a demand.

So the fact that blacks and Hispanics didn't do as well as whites on the engineers' exam—44 percent of the white firefighters who took the exam passed, compared to 32 percent of the blacks and Hispanics—is hardly evidence of persisting discrimination that might warrant remedial action. On the contrary, the exam results supply a noninvidious reason why there is a smaller fraction of black and Hispanic engineers than of black and Hispanic firefighters: the blacks and Hispanics didn't do as well as the whites on a fair test. They would have done even worse had not a portion of the exam been "race normed," meaning that the scores of the blacks and Hispanics were raised in order to reduce the disparity in the pass rate between them and the whites. Race norming has since been outlawed by the Civil Rights Act of 1991. Pub. L. No. 166, 102d Cong., 2d Sess., § 106, 105 Stat. 1071, amending 42 U.S.C. § 2000e-2.

All this said, the City might be able to prove in a trial that it had to alter the test scores and even depart from the rank order based on those altered scores in order to

put blacks and Hispanics where they would have been had there not been discrimination against them twenty years ago and more. I agree that there is adequate reason to believe there was discrimination back then even though there is no actual finding to that effect in any judicial decision; and the effects of that discrimination might have persisted into the 1980s by causing career delays. And there is nothing sacrosanct about tests or test scores. But the record compiled in the summary judgment proceedings does not allow us to conclude with anything like the certitude required to justify a grant of summary judgment that the racial and ethnic discrimination committed by the City against white firemen was justified within the narrow confines authorized by the *Croson* decision: fails to establish, that is, either that the discrimination against blacks and Hispanics did persist, or that the measures taken by the City are necessary to correct persisting effects. So far as the record shows, none of the minority firemen promoted out of order has ever been harmed, at least so far as his career in the fire department is concerned, by his racial or ethnic identity. I do not suggest that such evidence is necessary, although it would surely be sufficient. The City is entitled to take "action to rectify the effects of identified discrimination within its jurisdiction," *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 509; see also *Milwaukee County Pavers Ass'n v. Fiedler,* 922 F.2d 419, 421 (7th Cir. 1991). This dispensation would mean little as a practical matter if the City had to prove that the persons benefited by affirmative action had in fact been harmed by discrimination. But to repeat a tedious but essential refrain, so far as the record shows, by 1987 the effects of past discrimination by the Chicago Fire Department had completely dissipated, and the favoritism challenged in this case was pure racial politics. Maybe not, but to conclude not we need a trial. To suggest that these issues can be concluded by reading the papers submitted with a motion for summary

judgment is to fail to take seriously the Supreme Court's instruction to take reverse discrimination seriously.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 7295

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Plaintiffs,

v.

HAROLD WASHINGTON, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

In this case white members of the Chicago Fire Department ("CFD") bring claims under 42 U.S.C. Sections 1981 and 1983 alleging that the CFD's promotional decisions subjected them to reverse discrimination in violation of the Equal Protection Clause. Plaintiffs Chicago Fire Fighters Union Local No. 2 and some of its white members, and defendants City of Chicago and some of its officers, both have moved for summary judgment.

Our Seventh Circuit Court of Appeals recently agreed with a fellow judge in this district that "[n]o area of constitutional law has been more unsettled than that gathered under the rubric of 'affirmative action.'" *Cygnar v. City of Chicago,* 865 F.2d 827, 843 (7th Cir. 1989) *quoting Cygnar v. City of Chicago,* 652 F. Supp. 287, 297 (N.D. Ill. 1986) (Shadur, J.). This court has found the Supreme Court's affirmative action jurisprudence equally abstruse. Although rarely easy to apply, nonetheless, careful consideration of the Court's affirmative action princi-

ples compels this court to grant defendants' motion for summary judgment.

I. BACKGROUND FACTS

The uniformed, non-exempt fire suppression ranks of the CFD include, in ascending order of promotion, the following: Firefighter, Engineer, Lieutenant, Captain, and Battalion Chief. (Defendants' 12[l] Statement at ¶¶ 4-5; [1] Strensland Aff. ¶ 5.)

Plaintiff Chicago Fire Fighters Union Local No. 2 ("Union") is the collective bargaining representative for certain uniformed personnel of the CFD. The individual plaintiffs are white members of the CFD who held the rank of Firefighter or Lieutenant. In their first amended complaint [2] plaintiffs allege that defendants, the City of Chicago ("City") and some of its officers,[3] discriminated against them on the basis of race by making certain non-rank-order ("NRO") promotions.

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[1] In moving for summary judgment defendants, in compliance with Local Rule 12(l), filed a statement of material facts as to which defendants contend there is no genuine issue and that entitle them to judgment as a matter of law. Plaintiffs, however, failed to respond to defendants' statement as required by Local Rule 12(m). Instead, plaintiffs filed only a 12(l) statement in support of their own motion for summary judgment—a statement which in this instance does not comply with the requirements of Rule 12(m). Therefore, as required by Rule 12(m) all material facts set forth in defendants' 12(l) statement will be deemed to be admitted. Local Rule 12(m); *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990).

[2] On August 25, 1988 plaintiffs filed a Second Amendment to the Complaint, substituting new language for four paragraphs of the first amended complaint.

[3] Namely, defendant Harold Washington, the late mayor of the City, and Louis Galante and Jesse Hoskins, the Fire Commissioner of the CFD and the Commissioner of the Department of Personnel of the City, respectively. Plaintiffs bring suit against these individual defendants both in their official and individual capacities.

Plaintiffs make two claims. In Count I of the complaint the Firefighter plaintiffs allege that the defendants' policy of NRO promotions prevented them from being promoted to the next highest rank—Fire Engineer. In Count II the Lieutenant plaintiffs aver that the defendants' conduct precluded them from being promoted to their next highest rank—Fire Captain.

On January 19, 1985 the City, under the auspices of the CFD and the Department of Personnel, administered a two-part Fire Engineer's examination. 1,035 Firefighters interested in promotion to Engineer took the first part of the Engineer's examination—a written test. The Firefighters passing the written test were then given a practical "hands-on" test, or "simulator" test. Based on the results of this simulator test defendants posted the Engineer Promotional List, a list which ranked each Firefighter in accordance with the score achieved on the simulator test.

In a similar fashion, in September of 1986 the City also administered a two-part promotional examination for Fire Captain. 534 Fire Lieutenants completed the written portion of the examination, and about 506 subsequently completed an oral portion. Again, based upon the results of these tests defendants posted a Captain Promotional List, a list which ranked the Lieutenants based upon their scores on the examination.

Plaintiffs object neither to the examinations they took nor to the promotional rosters derived therefrom. On the contrary, plaintiffs contend that both the Engineer and the Captain examinations were carefully scrutinized to assure their validity as a promotional device. What plaintiffs protest is defendants' decision to make NRO promotions based upon race.

The NRO promotions at issue occurred for promotion both to Fire Engineer and Fire Captain. In June of 1987 Jesse Hoskins, the City's Commissioner of Person-

nel, informed Louis Galante, CFD Commissioner, that the third set of promtions from the Engineer Promotional List 'should be made on an affirmative action basis, with the goal that 20% of the persons promoted to Engineer would be Black and additional 5% of those promoted would be Hispanic." (Defendants' Exhibit E.) On August 6, 1987 defendants issued an order certifying 56 Firefighters for the rank of Engineer. Eight Firefighters waived or otherwise declined promotion to Engineer, leaving 48 Firefighters identified for promotion. Pursuant to Commissioner Hoskins' directive the last eight Firefighters identified in the promotion order, all of whom were black, were promoted out of rank order—that is, were lower in rank on the Engineer Promotional List than the Firefighter plaintiffs.

Likewise, in July of 1987 Commissioner Hoskins informed CFD Commissioner Galante that promotions from the Captain Promotional List should be made with the goal of promoting 20% black and 5% Hispanic candidates. (Defendants' Exhibit F.) On October 1, 1987 defendants issued an order certifying 24 Lieutenants for the rank of Captain. The first 23 Lieutenants named to the rank of Captain were in rank order from the Captain Promotional List. The last Lieutenant, however, an Hispanic-American, was promoted out of rank order—*viz,* was lower in rank on the Captain Promotional List than the two Lieutenant plaintiffs.

Plaintiffs brought this suit under 42 U.S.C. Sections 1981 and 1983, alleging that the NRO promotions violated the Equal Protection Clause.

II. DISCUSSION

Because the court considers this case on cross motions for summary judgment, neither party can prevail unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any ma-

terial fact and that the moving party is entitled to a judgment as a mater of law." Fed. R. Civ. P. 56(c). In ruling on these cross motions for summary judgment the court must believe the evidence of the non-movant, drawing all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).

When confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). The party must do more than simply "show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.*, 475 U.S. at 587, 106 S. Ct. at 1356.

A. *Plaintiffs' Equal Protection Claim*

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." To determine whether the City's affirmative action policy at issue violates the Equal Protection Clause this court must subject it to "strict scrutiny." *City of Richmond v. Croson*, 468 U.S. 469, 109 S. Ct. 706, 721 (1989). To survive this heightened scrutiny the policy must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest. *Id.*

1. *Justification by a Compelling Governmental Interest*

To survive the first prong of the strict scrutiny test the City's affirmative action policy must be justified by a compelling interest. Clearly, the City would have a compelling interest in remedying past (and present) racial discrimination in making promotional decisions at the CFD—which is precisely the interest which defendants assert. *Croson*, 109 S. Ct. at 720; *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053, 1065 (1987); *Wygant v. Jackson Board of Education*, 478 U.S. 267, 106 S. Ct. 1842, 1853 (1986) (O'Connor, J., concurring).

The Court has made clear that a "contemporaneous or antecedent finding of past discrimination by a court or other competent body is *not* a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action program." *Wygant*, 476 U.S. at 189, 106 S. Ct. at 1855 (O'Connor, J. concurring) (emphasis added). However, the Court has insisted upon "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1847 (plurality).

In *City of Richmond v. Croson*, 468 U.S. 469, 109 S. Ct. 706, 721 (1989), the Court clarified the showing that defendants must make in order to justify remedial relief. The Court held that a district court must make a factual determination that a governmental body had a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 109 S. Ct. at 724, 730, *quoting Wygant*, 476 U.S. at 277, 106 S. Ct. at 1848 (plurality). Only then would the governmental entity have a compelling interest in favoring one race over another. *Croson*, 109 S. Ct. at 723.

Although the defendants in this case must present a strong basis for concluding that remedial action was ap-

propriate, the ultimate burden nonetheless remains with the plaintiffs to demonstrate the unconstitutionality of the NRO promotions—that the defendants' evidence failed to support an inference of prior discrimination or that the remedial relief chosen was not "narrowly tailored" to its purpose. *Wygant,* 476 U.S. at 277-78, 293, 106 S. Ct. at 1849, 1857.

In making their showing defendants cannot rely solely upon a generalized assertion that there has been past discrimination in the CFD, as this would provide no guidance for the department to determine the precise scope of the injury it seeks to remedy and thus would be insufficient to justify the affirmative action at issue. *Croson,* 109 S. Ct. at 723-4. Defendants rely upon four bases to justify their affirmative action policy: (1) the obligations of a previous order of settlement and the history of litigation that produced it; (2) the City's contract with the Union requiring the CFD to reach as quickly as is reasonably possible a level as close to 45% minority representation in each rank of the CFD as is "reasonably achievable"; (3) the disparities between minority representation in the Engineer and Captain ranks and representation in the ranks immediately below them; and (4) the discriminatory adverse impact of the Engineer examination on minorities.

a. *The McGarr Order* [4]

In 1973 the United States Department of Justice brought suit against the City of Chicago alleging that the hiring and promotion practices of the CFD unlawfully discriminated against blacks and Hispanics. (Cole Aff. ¶ 5.) At that time less than 5% of the uniformed per-

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[4] As plaintiffs correctly note, the Order entered by Judge McGarr of this District does not bar this action because plaintiffs did not in any way join in that agreement. *Martin v. Wilks,* 109 S. Ct. 2180, 2188 (1989).

sonnel in the CFD were black or Hispanic. (Cole Aff. ¶ 6.)

The same year the suit was filed the Seventh Circuit Court of Appeals entered an injunction pending appeal against the City on the hiring issue. At that point, the City concluded that it would not be able to successfully defend against the Department of Justice's discriminatory hiring claims. Accordingly, the City entered into a consent decree which established an interim 50% minority (black and Hispanic) hiring ratio and a long range goal requiring the City to substantially increase the minority composition of the CFD. (Cole Aff. ¶ 7.)

Because little hiring took place between 1974 and 1978, the interim hiring goal established by the 1974 consent decree had a limited immediate effect in increasing the proportion of blacks and Hispanics in the CFD—by September 1978, the CFD contained 9% blacks and Hispanics. Thus, supplemental hiring orders were entered providing that additional hiring be done on the basis of a 50% minority ratio. (Cole Aff. ¶ 8; Defendants' Exhibit A.)

With respect to the issue of promotions, the Justice Department challenged as discriminatory the promotional examinations and eligibility lists that had been used in the 1960's and early 1970's. (Cole Aff. ¶ 9.) Although the district court ruled in the City's favor, the Court of Appeals reversed and remanded for further proceedings. (Cole Aff. ¶ 10.)

In 1978, prior to the completion of the remand proceedings, the City's Department of Personnel prepared and administered new promotional examinations for each rank in the CFD. (Cole Aff. ¶ 11.) In early 1980 the Department of Justice advised the City that it intended to file a new lawsuit challenging all four of the newly administered promotional examinations on the grounds that they had a severe adverse impact against minority candidates. (Cole Aff. ¶ 13.)

In response to this latest lawsuit representatives of the CFD, the City's Department of Personnel and the City's Law Department convened a series of meetings to analyze the strengths and weaknesses of the Justice Department's case. Those taking part in that meeting concluded that the examinations had a severe adverse impact on minority candidates, that the examinations had not been adequately validated, especially not for use in ranking candidates, and that the efficiency ratings (one of the components of a candidate's final score) were racially discriminatory. (Cole Aff. ¶ 14.)

Based upon this assessment, the high costs of litigation, and a belief that the promotion process had been unfair to black and Hispanic members of the CFD, the City decided to settle the lawsuit with the Justice Department. (Cole Aff. ¶ 15.) The resulting settlement agreement established a 1-to-4 minority/white promotion ratio as an interim requirement for promotions to the ranks of Lieutenant and Engineer until new, validated promotional examinations could be administered and new promotional lists posted. Additionally, the agreement initiated a long-term promotional goal which would require the City to substantially increase minority participation at each rank of the CFD so that the minority composition of each rank would mirror the racial composition of the preceding rank. (Cole Aff. ¶ 16.)

This settlement agreement was approved by the district court, Honorable Frank J. McGarr, and incorporated into an Order of Settlement entered March 31, 1980 ("McGarr Order"). (Cole Aff. ¶ 17.) The McGarr Order states that "defendants, as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks [of the CFD] with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made." (McGarr Order at 2-3, Defendants' Exhibit B.)

Defendants "technically admit" that no formal findings of discrimination were made in the course of either of the two lawsuits which ultimately were resolved by the McGarr Order. (Defendant's 12[m] Statement at ¶ 1.) Indeed, because it reflected settlement of the Justice Department's latest suit against the City, the McGarr Order itself makes no formal finding of past discrimination. Moreover, as plaintiffs aptly point out, in accepting the terms of a consent decree "the parties are free to agree on relief more extensive than federal law requires." *Kasper v. Board of Election Commissioners,* 814 F.2d 332, 338 (7th Cir. 1987). Therefore, while the consent decree itself may be consistent with the Constitution and laws, any affirmative action plan promulgated pursuant to it may not necessarily be. *See U.S. v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989).

Nonetheless, in an attempt to present a formal finding of past discrimination defendants cite the Seventh Circuit's reversal and remand of an earlier district court finding of non-discrimination. (Defendant's 12[m] Statement at ¶ 1.) In *United States v. City of Chicago,* 573 F.2d 416 (7th Cir. 1978), the Seventh Circuit enjoined permanent promotions based on the 1969 Engineer's, 1970 Lieutenant's, and 1973 Captain's examinations unless such promotions first were offered to minority candidates on the respective lists. 573 F.2d at 429. In providing injunctive relief the court must have believed that the Justice Department had a sufficient likelihood of succeeding on the merits in demonstrating that the promotional examinations at issue discriminated against blacks and Hispanics. *See, e.g., Helene Curtis Industries, Inc. v. Church & Dwight Co.,* 560 F.2d 1325, 1330 (7th Cir. 1977). Moreover, the district court had held that the Justice Department had made out a prima facie Title VII case of discrimination based upon the disparate impact of the Engineer, Lieutenant, and Captain exams—a holding which the Court of Appeals did not dispute *per se,* but simply remanded for specific findings of fact. 573 F.2d at 425.

These decisions indicate—without formally so holding—that the City most likely was faced with a prima facie case of racial discrimination. Nonetheless, it warrants reiteration that a formal judicial finding of past discrimination is not a constitutional prerequisite to voluntary agreement to an affirmative action program. *Wygant*, 476 U.S. at 189, 106 S. Ct. at 1855 (O'Connor, J. concurring). As Justice O'Connor cautioned:

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the voluntary efforts to further the objectives of the law."

Id., 476 U.S. at 290, 106 S. Ct. at 1855 (citations omitted).

Thus, although there exist no formal findings of past discrimination in the CFD, the litigation history of the CFD's past hiring and promotion practices offers at least some evidence of past discrimination. This evidence, when combined with other evidence provided by defendants (discussed below), constitutes a "strong basis" for the conclusion that remedial action was necessary. *Croson*, 109 S. Ct. at 730.

b. *The Collective Bargaining Agreement*

The defendants argue that the City's collective bargaining agreement with the Union offers additional support for the City's decision to engage in affirmative action in its promotion process. The union contract requires the City both to comply with decrees and agreements reached in court proceedings and also to have transfer and promotion policies with the goal of including blacks and His-

panics in all categories and ranks of the CFD to "reach as quickly as is reasonably possible a level as close to 45% as is reasonably achievable." (Union Contract, Appendix G, attached as Plaintiffs' Exhibit 3.) This same language has been in every contract between the City and the Union from 1980 to the present. (Stensland Aff. ¶ 12.)

The existence of an affirmative action goal in a collective bargaining agreement alone may not be sufficient to support a factual determination that the CFD had a "strong basis" for its conclusion that NRO promotions were necessary. Nonetheless, the affirmative action provisions of the Union's collective bargaining agreement corroborate other more direct evidence of past discrimination in the ranks of the CFD.

c. *Minority Underrepresentation Statistics*

Defendants' statistics reflecting minority underrepresentation in the ranks of the CFD provide the strongest evidence of past discrimination in the CFD.

The Court has held that a statistical imbalance sufficient for a Title VII prima facie case would satisfy the constitutional requirement that the City have a "strong basis" for believing that remedial action was required. *Croson,* 109 S. Ct. at 724; *Wygant,* 476 U.S. at 274-5, 106 S.Ct. at 1847 (plurality); *Johnson v. Transportation Agency, Santa Clara County, Cal.,* 480 U.S. 616, 107 S. Ct. 1442, 1461-2 (1987) (O'Connor, J., concurring in the judgment); *Hazelwood School District v. United States,* 433 U.S. 299, 307-308, 97 S. Ct. 2736, 2741 (1977) (where "gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII).

The parties to this case dispute whether the appropriate statistical comparisons here are between the percentage

of minorities in the relevant ranks of the CFD and the general labor population, or between the percentage of minorities in a particular rank of the CFD and the rank immediately below it. The latter comparison is correct.

As the Supreme Court has stated, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazelwood,* 433 U.S. at 308 n.13, 97 S. Ct. at 2742 n.13. Thus, where special qualifications are required the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be "the number of minorities qualified to undertake the particular task." *Croson,* 109 S. Ct. at 725.

In this case comparisons to the general labor population in Chicago are inappropriate. The relevant statistical pool for promotion to Engineer is the group of Firefighters, as all promotions are made from that group—the next lowest rank. Similarly, the qualified labor pool for promotion to Captain is the group of Lieutenants, because all promotions to Captain are made from that rank. If there is a significant statistical disparity between the number of qualified minority Firefighters willing and able to serve as Engineers and the number of minorities actually serving as Engineers, an "inference of discriminatory exclusion could arise." *Croson,* 109 S. Ct. at 729, *citing Bazemore v. Friday,* 478 U.S. 385, 398, 106 S. Ct. 3000, 3008 (1986) *and Teamsters v. United States,* 431 U.S. 324, 337-339, 97 S. Ct. 1843, 1856 (1977). A similar inference could arise by comparing the number of qualified minority Lieutenants willing and able to serve as Captains and the number of minorities actually serving as Captains.

It is undisputed that as of June 30, 1987 only 11.0% of the total CFD Engineers were black or Hispanic. However, blacks and Hispanics comprised 29.2% of the CFD's Firefighters. Similarly, although minorities comprised only

3.6% of the CFD's Captains, 13.6% of the CFD's Lieutenants were black or Hispanic. (Defendants' 12[l] Statement at ¶ 5, *citing* Stensland Aff. at ¶ 19.)

Without presenting any evidence to the contrary, plaintiffs merely assert that these figures are not statistically significant and thus fail to make out a prima facie case of racial discrimination. However, as defendants correctly note, a difference of greater than two or three standard deviations between the expected percentage and the observed percentage of minorities in a relevant labor pool can be sufficient to support an inference of discrimination. *See Hazelwood,* 433 U.S. at 308 n.14, 97 S. Ct. at 2742 n.14.

Defendants have presented uncontradicted evidence that in 1987 the difference between the expected percentage of blacks and Hispanics in the Engineer rank given the percentage in the Firefighter rank was 8.7 standard deviations—"well beyond the level of chance." (Joyce Supp. Aff. ¶ 4.) Similarly, the difference between the expected percentage of blacks and Hispanics in the Captain rank given the percentage in the Lieutenant rank was 3.96 standard deviations—again "well beyond the possible effect of chance." (Joyce Supp. Aff. ¶ 2.)

Likewise, defendants aptly point out that a showing that a disparity between the number of minorities in relevant labor pools is statistically significant at the .05 level—meaning that the odds are one in twenty that the result occurred by chance—is sufficient to support an inference of discrimination. *See Segar v. Smith*, 738 F.2d 1249, 1282-83 (D.C. Cir. 1984). Again, defendants have presented uncontradicted evidence that the disparity between the actual and expected number of minority Engineers given the racial composition of the Firefighter rank, and the disparity between the actual and expected number of minority Captains given the racial composition of the Lieutenant rank, is statistically significant well below the .05 level. (Joyce Supp. Aff. ¶¶ 3-4.)

It could be argued (but plaintiffs do not) that defendants' statistics are too simplistic, as they contain only one independent variable: race. *See Allen v. Seidman,* 881 F.2d 375, 378-80 (7th Cir. 1989). However, a simple statistical comparison can support a prima facie case of discrimination, especially when an opposing party fails to conduct a more sophisticated comparison. *Id.* at 380; *Regner v. City of Chicago,* 789 F.2d 534, 538 (7th Cir. 1986); *Aguilera v. Cook County Police & Corrections Merit Board,* 760 F.2d 844, 846 (7th Cir. 1985).

When confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial. *Celotex Corp. v. Catrett,* 477 U.S. at 324, 106 S. Ct. at 2553. Plaintiffs have failed to do this with regard to defendants' statistical evidence of minority underrepresentation in the relevant ranks of the CFD. Thus, this court accepts and finds compelling defendants' statistical evidence of past discrimination in the CFD.

d. *Evidence of Adverse Impact of the Engineer Examination on Minorities*

Finally, to show that they had a compelling interest in instituting affirmative action promotions defendants present evidence that the 1985 Engineer examination had an adverse impact on minority candidates when used as a rank order device.

It is clear that a prima facie case of racial discrimination may be established by showing that a particular examination has an adverse racial impact on minority candidates. *See, e.g., Bushey v. N.Y. State Civil Service Commission,* 733 F.2d 220, 224-25 (2d Cir. 1984). A plaintiff seeking to make out a prima facie case typically applies to test results the "four-fifths" rule of the Equal

Employment Opportunity Commission's Uniform Guidelines on Employment Selection, 29 C.F.R. § 1604.4(D).[5] *Id.* at 225-26.

Defendants in this case admit that neither the simulator portion of the Engineer examination nor either portion of the Captain examination had an overall adverse impact upon minority candidates. (Defendants' 12[m] Statement at ¶¶ 10, 13; Joyce Aff. at 126-27.) They present uncontradicted evidence, however, that starting with the third promotion to Engineer from the 1986 Engineer eligibility list the minority success rate of promotion was less than 80% of the white success rate of promotion, and thus under the "four-fifths" rule the Engineer examination had an adverse impact on minority candidates when used as a rank order device. (Joyce Aff. at ¶ 10.)

Defendants go on to note that if a selection device has more of an adverse impact when used for a ranking device than it does otherwise (e.g. on a pass/fail basis), then it must be validated specifically for use in rank order selection. (Defendants' Mem. in Support at 19-20; Requests to Admit and Plaintiffs' Responses to Requests for Admission, Exhibit O at ¶ 2.) Defendants then present expert evidence that the Engineer examination was not and could not have been validated for making rank order promotions. (Barrett Aff. at ¶ 17.)

Plaintiffs assert, however, that there is a genuine issue of material fact as to whether the Engineer examination was validated for use as a rank order device. Plaintiffs cite the deposition of Robert T. Joyce, the City's Deputy Commissioner of Personnel, who stated, based upon a

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[5] 29 C.F.R. § 1607.4(D) provides in relevant part: "A selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."

pilot study, that "we felt that [the simulator portion of the Engineer examination] could be satisfactorily used as a ranking device." (Joyce Dep. at 48.)

Mr. Joyce's testimony must be viewed in its entirety, however. Later, when asked specifically whether the Engineer's examination in fact even had been validated for the purpose of rank order assignments, Mr. Joyce responded "no." (Joyce Dep. at 246.) Indeed, corroborating defendants' expert, Mr. Joyce unequivocally stated that the Engineer examination was not and, given the circumstances faced by the City, could not have been validated for making rank order assignments. (Joyce Dep. at 246; Barrett Aff. at ¶ 17; *see also* Shepherd Dep. at 290-91.)

Thus, there is no genuine issue of material fact that at least the Engineer examination had an adverse impact on minority candidates when used as a rank order device and was not (and could not have been) validated for rank order use. The adverse impact of the Engineer examination further convinces this court that the defendants have sufficiently demonstrated a compelling interest justifying affirmative action promotions.

In summary, then, based upon the litigation history of the CFD's past hiring and promotion practices, the affirmative action provisions of the collective bargaining agreement between the City and the Union, the significant disparities between minority representation in the Engineer and Captain ranks and representation in the ranks immediately below them, and the discriminatory adverse impact of the Engineer examination on minorities, this court concludes that there is no genuine issue of material fact that the City had a strong basis in evidence for its conclusion that its affirmative actions promotions were necessary.

2. *Narrowly Tailored To Accomplish a Remedial Purpose*

However, not only must there be no genuine issue of material fact that plaintiffs had a compelling interest requiring remedial measures, but also the remedy chosen must be narrowly tailored to accomplish its purpose. *Croson,* 109 S. Ct. at 721.

In determining whether the City's affirmative action goals are appropriate this court must look to several factors, including:

> the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 107 S. Ct. at 1067. Careful scrutiny of these factors confirms that the City's policy of affirmative action promotions was narrowly tailored to serve its remedial ends.

First, given the City's compelling interest in remedying past discrimination the necessity for relief in this case is great. Moreover, the City determined that "no other approach [other than NRO promotions] would permit meaningful affirmative action progress." (*See* Defendants' Exhibits E and F.) Indeed, as defendants correctly note, since promotions to the ranks of Engineer and Captain could only be made from the ranks below them, a race-neutral method for expanding minority representation in the upper ranks, such as aggressive recruitment, was not possible.

Second, the City's affirmative action goals are sufficiently flexible and limited in duration. The plaintiffs repeatedly characterize the City's affirmative action plan as a 25% "set-aside" for minorities. (*See, e.g.,* Plaintiffs' 12[l] Statement at ¶¶ 15-16.) However, as defendants

aptly point out, this characterization is not supported by the evidence. (*Compare* Hoskins Tr. at 31-33, cited by plaintiffs, *to* Defendants' Exhibits E and F.) In fact, it is clear that the affirmative action program at issue consists of a policy, promulgated in mid-1987, under which promotions to the ranks of Captain and Engineer would be made with the "goal" of having 20% offered to black candidates and 5% to Hispanic candidates. (Defendant's Exhibits E and F; Hoskins Dep. at 7.)

By definition, a goal for minority representation is more flexible than an unyielding quota. Moreover, under this particular goal no unqualified black or Hispanic candidate need be offered a promotion. On the contrary, there is no dispute that the black and Hispanic candidates promoted ahead of plaintiffs—all of whom successfully completed their respective examinations—were fully qualified for promotion. (Joyce Aff. ¶¶ 12-13.) In fact, plaintiffs themselves allege that the promotional examinations for the ranks of Engineer and Captain are valid measures of the qualifications for candidates to those ranks. (First Amended Complaint, ¶¶ 12, 27.)

It also is uncontested that the City's affirmative action goals are of limited duration—applied for only three years or until a specified number of promotions have been made from the promotional lists at issue. Moreover, "to insure flexibility and to guarantee that the ratios are used only so long as they are necessary and appropriate, the affirmative action promotional goals will be reevaluated on an annual basis." (Defendant's Exhibit E at 4-5, Exhibit F at 4-5.)

Third, given the disparity between minority representation in the Engineer and Captain ranks and representation in the ranks immediately below them, the City's numerical goals are sufficiently related to the relevant labor market. This is especially true given that the City's stated policy is to review the goals annually to determine whether they are still necessary and appropriate; and in any event the City will eliminate the goals

after three years or after a certain number of promotions have been made under them.

Finally, the City's goals neither create a bar to white advancement nor excessively burden white candidates for promotion. Under the City's policy white candidates will continue to be promoted to the ranks of Engineer and Captain at high levels. Moreover, as the Court has stated, " '[d]enial of a future employment opportunity is not as intrusive as loss of an existing job,' . . . and plainly postponement imposes a lesser burden still." *Paradise*, 107 S. Ct. at 1073, *quoting Wygant*, 476 U.S. at 282-83, 106 S. Ct. at 1851 (plurality).

Thus, the court holds that there is no genuine issue of material fact that the City's affirmative action goals at issue here were narrowly tailored to their remedial purpose. Because this court finds that there can be no significant doubt both that the City's affirmative action goals were justified by a compelling governmental interest and also that the goals were narrowly tailored to serve that interest, summary judgment must be granted in favor of the defendants.

B. *Plaintiffs' Section 1981 Claim*

Apart from equal protection analysis, plaintiffs' Section 1981 claim is untenable for another reason. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Supreme Court recently addressed the issue of whether a promotion claim is actionable under Section 1981. The Court held:

> [T]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. . . . Only where the promotion rises to the level of an opportunity for a *new and distinct relation* be-

> tween the employee and the employer is such a claim actionable under § 1981.

109 S. Ct. at 2377 (emphasis added). *Patterson* requires this court to grant summary judgment in defendants' favor on plaintiffs' Section 1981 claims for two reasons.

First, plaintiffs' first amended complaint, filed and further amended before *Patterson* was decided, contains neither allegations nor facts indicating that promotion to the ranks of Engineer or Captain would result in a "new and distinct" relationship between the plaintiffs and the CFD.[6] Plaintiffs have failed to amend their complaint to allege such facts. This is fatal to their Section 1981 claims. *See Greggs v. Hillman Distributing Co.*, 719 F. Supp. 552, 555 (S.D. Tex. 1989).

Second, on summary judgment, plaintiffs—who of course bear the burden of proof on their Section 1981 claim—must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact in this case which requires trial. Plaintiffs have designated no facts whatsoever indicating that their promotions would have created a new and distinct relation with the CFD. Therefore, summary judgment must be entered against plaintiffs on the Section 1981 claims. *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S. Ct. at 2553.

C. *Qualified Immunity*

Finally, regardless of this court's ruling on equal protection liability, Louis T. Galante and Jesse Hoskins are entitled to qualified immunity from suit in this case.

Under the doctrine of qualified immunity public officials "performing discretionary functions are protected against suits for damages unless their conduct violates

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[6] *See* Second Amendment to the Complaint, filed August 25, 1988.

clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbitt,* 881 F.2d 510, 511 (7th Cir. 1989). Commissioners Galante and Hoskins allegedly were involved with the decision to institute the affirmative action goals at issue as of the middle of 1987. (*See* Defendants' Exhibits E and F.) At that time (as now) the most recent Supreme Court decisions upheld affirmative action plans which were narrowly tailored to serve proper remedial purposes. *See, e.g., Paradise,* 107 S. Ct. at 1074 (1987).

As discussed above, when the City instituted its affirmative action goals: (1) the City was bound by the McGarr Order to "promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks of the Chicago Fire Department"; (2) the City had a collective bargaining agreement with the Union setting a goal of 45% minority representation throughout the CFD; and (3) there was a significant statistical disparity between the proportion of minority members in the Engineer and the Captain ranks of the CFD compared to the proportion in the ranks immediately below them.

Moreover, also as discussed above, the City affirmative action plan created the "goal" that 20% of promotions to Engineer and Captain be given to black candidates and 5% to Hispanic candidates. The goal was to be of limited duration. Moreover, no unqualified black or Hispanic candidates would be offered NRO promotions.

Given these facts a reasonable fire commissioner or personnel commissioner could have concluded that he could take race into consideration for a limited reorganization of the Engineer and Captain rank of the CFD. *See Auriemma v. Rice,* 895 F.2d 338, 343-44 (7th Cir. 1990); *Cygnar,* 865 F.2d at 844.

III. CONCLUSION

Because the pleadings, deposition testimony, answers to interrogatories, and affidavits show that there is no genuine issue as to any material fact in this case and that the defendants are entitled to a judgment as a matter of law, defendants' motion for summary judgment is GRANTED. This case is dismissed in its entirety.

ENTER:

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

Dated: May 7, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 8731

HONORABLE JAMES B. ZAGEL

EARL BILLISH, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This case presents a claim of reverse discrimination in violation of the equal protection clause. I have granted summary judgment for defendants on their due process claim in an opinion issued 28 November 1988. That opinion is appended here, and it recites the history and facts of the case.

The equal protection theory has changed over the course of the case. The claim began as a challenge to the defendants' action in January, 1987 in taking down (refusing to use) the 1979 fire department promotion list for Captain until the list was exhausted. The defendants so acted, said the plaintiffs, because every name on the list belonged to a white male. There is no dispute here that it was rational for defendants to retire a seven year old list. Indeed, it is hard to imagine a sound personnel management policy which would cause any public safety service to allow a list to be used for that long.

But the defendants left the promotion list in place.[1] Plaintiffs contended that the age of the list was not the reason for the defendants' refusal to use it. There was, however, no real evidence to support the plaintiffs' contention. So the claim has been changed.

Now in a revised theory plaintiffs say defendants denied them equal protection because defendants in January, 1987 (a) reached down below the set cut-off score for persons qualified for promotion solely to elevate two blacks to the rank of Captain and (b) then retired the list and refused to make further use of it, having exhausted from the 1979 list all non-whites.

The defendants do not dispute that the two blacks were promoted as a result of affirmative action taken on the basis of race. Such promotions do not violate equal protection even if some whites were hurt by them, if the affirmative action is properly justified and carried out. *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987). The plaintiffs here bear the burden of showing that the rationale for affirmative action is inadequate[2] *or* that the specific actions unnecessarily trammel the legitimate interests of non-minorities.[3]

There appears to be no hope that plaintiffs can prevail in proving unnecessary trammeling. Their interests are not great enough. What is at stake here is not promotion to Captain, but the right to be considered for promotion to Captain. Plaintiffs could (but do not) argue that actual promotion is at issue here because the two promotions

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[1] As they did the police sergeants' list. *United States v. City of Chicago*, —— F.2d —— (88-3301) (6 Feb. 1990).

[2] *United States v. Paradise*, 107 S. Ct. at 1064-66; *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1853-54 (1986) (O'Connor, J., concurring).

[3] *Wygant v. Jackson Board of Education*, 106 S. Ct. at 1850-51; *Johnson v. Transportation Agency*, 107 S. Ct. at 1455.

given to blacks would have been given to them. This would apply to only two plaintiffs. Or it could be argued that promotions would have gone to the next two persons on the rank order list. This argument helps only Dunne (who was promoted from the successor list) and not the other eight plaintiffs.

The denial of an opportunity to be considered for promotion, the harm caused plaintiffs here, is less than denial of employment or termination of employment. This distinction is recognized in law. *United States v. Paradise*, 107 S. Ct. at 1073. Indeed what occurred here was not even the denial of an opportunity to be considered for promotion, it was postponement of the opportunity. All plaintiffs may compete for promotion from the new Captain's list. There is no absolute bar here to advancement by white males. The defendants' actions were not more than required to meet affirmative action goals (whose achievement has yet to occur).[4] In short, if defendants could lawfully pursue a course of affirmative action then the course pursued here did not unnecessarily trammel the rights of plaintiffs.[5]

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[4] The City was not relentless in promoting minorities. Between January, 1987 (when the two blacks were promoted) and March, 1985, there were over fifty promotions to Captain. All promotees were white. Indeed from August, 1979 to June, 1987 minority representation in the rank of Captain was nearly halved.

[5] There are two side issues here regarding the qualifications of the black promotees.

(1) There is apparently no problem under the union agreements or state law with respect to the two promotions of blacks. Those acts were challenged in arbitration by the union and the Arbitrator found in favor of the City.

(2) The two blacks had scores below 70, the cut-off score usually used by the City. Plaintiffs say that the blacks were "unqualified" and thus promoted over "qualified" whites. There is no evidence to support the link between a score of 70 and qualification. The cut-off score is at a level needed to assume an adequate number to fill

Can the plaintiffs prove that the City's rationale for affirmative action is inadequate? The answer is no. There were and are significant disparities between minority availability and minority employment at all ranks in the Fire Department. This is true whether comparisons are made between external availability or internal availability of minorities.[6] There is the historical fact of the use of hiring and promotion procedures that had an adverse impact and were not adequately validated. Promotion procedures included racially discriminatory performance evaluations. Indeed the United States took the City to court over these matters. *See U.S. v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). The litigation ended in a consent decree. The binding nature of that decree on plaintiffs is subject to question, *see Martin v. Wilks*, 110 S. Ct. 11 (1989), but the terms of the decree and the circumstances of its entry do corroborate the City's assertion that it had a rational basis for its affirmative action policy. Indeed the only real attack on the City's rationale is that it is not contained in some formal document or plan. A formal finding of discrimination is not required. *Wygant v. Jackson Board of Education*, 106 S. Ct. at 1853 (O'Connor, J., concurring); *id.*, 106 S. Ct. at 1863 (Marshall, J., dissenting). The basis shown by the City here is enough. And there are, in a real sense, two

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the needs for captains. The City regards all above the cut-off score as qualified; it does not find those below to be unqualified. In this case the Department of Personnel specifically determined, on the basis of the scores of the two blacks, that they were qualified to serve as captains. Nor was this the first time the City had made promotions of persons (including whites) whose scores were below the cutoff. Moreover, the City does not defend the validity of the test used by the City as a component of the ranking score. The score includes performance ratings which the City recognizes as discriminatory.

[6] In June, 1987 minorities were 3.6% of Captains (including the two challenged promotions); external availability in the general population was 46%; internal availability (existing lieutenants) was 13.6% minority.

existing formal declarations of affirmative action goals and methods. The first is embodied in the 1980 consent decree, and the other is an appendix to the union contract.

There is finally no basis for challenging, on equal protection grounds, the decision to refuse to make further promotions from the 1979 list as plaintiffs first argued. When the decision was made every name on the list belonged to a white male. The City could reasonably conclude that the use of a state list ought to be deferred where its use would perpetuate effects of past discrimination and increase racial disparities. Deferring promotions excluded no one and preferred no one, and all plaintiffs were free to seek a place on the new list. There is no clear evidence that any promotions would have been made before the new list was posted. Five promotions were considered, but the Fire Commissioner did stale that the need for new captains was not so urgent that it could not await the replacement of the old list.

The defendants' motion for summary judgment on the equal protection claim is granted.[7]

The defendants' motion under 28 U.S.C. Sec. 1927 for sanctions of $562.25 (the cost of expedited transcript) is granted.

Enter:

/s/ James B. Zagel
JAMES B. ZAGEL
United States District Judge

Date: 16 Feb 1990

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[7] In *City of Richmond v. J. A. Croson*, 109 S. Ct. 706 (1979) the Court invalidated a program of affirmative action because (1) the discrimination to be remedied was that of society in general, not of or in the City of Richmond, (2) the beneficiaries were not themselves victims of discrimination, and (3) there was a specific quota whose level was set arbitrarily. In this case the showing was made that the City discriminated against blacks in developing the 1979 list and the remedy neither involved arbitrary quotas nor excluded whites from advancement.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 8731

HONORABLE JAMES B. ZAGEL

EARL BILLISH, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, nine white Fire Lieutenants employed by the City of Chicago, filed a two-count complaint against the City and Louis Galante, the City's Fire Commissioner, in his individual and official capacities. Count I alleges that the plaintiffs were deprived of their right to promotion to Fire Captain without due process of law; it seeks an order directing defendants to promote plaintiffs, and compensatory damages. Count II asserts a claim of reverse discrimination in violation of the equal protection clause. This Court denied plaintiffs' motion for a temporary restraining order on October 15, 1987. Before the Court is defendants' motion for summary judgment on the due process claim. Before turning to the merits of the motion, a brief review of the procedural history of this case is necessary.

The following chronology of events is set forth in two motions filed by the defendants, Defendants' Response Opposing Plaintiffs' Request for a Thirty Day Extension of Time and Defendants' Motion for Ruling Under Local

General Rule 13(b). When these motions were presented to the Court, the statements contained there were not disputed by the plaintiffs in a material way, so we accept them as true.

When this Court denied plaintiffs' motion for a temporary restraining order, plaintiffs' counsel urgently requested an expedited schedule for holding an injunction hearing. Defendants' counsel requested a reasonable time for discovery and for filing a motion for summary judgment. In response to plaintiffs' request, we set a schedule under which cross-motions for summary judgment would be fully briefed by January 4, 1988. This schedule was subsequently extended by one week.

Defendants state they would have appreciated an additional month to prepare their summary judgment papers, since it was impossible to conduct thorough research or begin preparation of a brief during the short period of discovery. However, defendants' counsel made substantial efforts to comply with the Court's schedule, which included finding other counsel to handle ongoing litigation and shortening a planned trip out of state during the Christmas holidays. Despite these efforts, defendants were unable to complete their motion by the due date. Plaintiffs' counsel refused to agree to an extension of even one week; this Court, however, granted the extension. We allowed defendants to file their motion two days past the due date.

Plaintiffs' response to the motion was due three weeks later. Instead of filing their response, plaintiffs sought a thirty-day extension on or close to the day the response was due. In view of plaintiffs' prior insistence on an expedited schedule and the efforts made by defendants to comply with that schedule, defendants opposed the motion for a thirty-day extension. Defendants recognized that plaintiffs' counsel had not yet prepared his brief, and to avoid prejudice to the plaintiffs, defendants proposed a fourteen-day extension. This Court agreed that a thirty-

day extension was unjustified under the circumstances, and granted plaintiffs an additional fourteen days.

After this extension was granted, plaintiffs' response was due Friday, February 12, 1988. Counsel for plaintiffs requested they be given the weekend to file their response, and as a courtesy, defendants' counsel agreed. As of February 24, 1988, defendants still had not received plaintiffs' response, nor had they received a motion for more time or a phone call regarding the delay. (The docket sheet reveals that plaintiffs did not seek an extension of time.) Defendants then filed their Motion for Ruling Under Local General Rule 13(b). (Rule 13(b) provides that the Court may grant a party's motion without further briefing or hearing, when the opposing party has failed to file its response.) Defendants' motion was presented to the Court on the same day that plaintiffs presented a motion to file their responsive memorandum instanter.

Based on all of the foregoing, in an oral ruling on February 24, 1987, we granted defendants' motion for ruling under Local Rule 13(b) and denied plaintiffs' motion to file instanter their responsive memorandum.[1] We indicated in open court that we would not simply grant defendants' motion by default, but rather would examine critically the motion and supporting evidentiary materials. For the reasons set forth below, defendants' motion for partial summary judgment on Count I, the due process claim, is granted.

I.

The facts giving rise to this action are essentially undisputed. In 1978, all of the plaintiffs took and passed a promotional examination for the position of Fire Captain. These examinations are administered by the City of Chi-

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[1] Subsequently, we did allow plaintiffs' motion to file their cross-motion for summary judgment on the equal protection claim. This opinion addresses only the due process claim.

cago. Each plaintiff was then placed on the Fire Captain's eligibility list which was posted in 1979. The names of the individuals eligible for promotion were listed in rank order, with the individual who received the highest score being ranked first. Plaintiffs were ranked from No. 239 to No. 281 on the 1979 list. In 1986 and early 1987, the City administered a new Captain exam. Every Lieutenant, including the nine plaintiffs and others who remained on the 1979 list, were eligible to take this exam. Each plaintiff took and passed this exam and was ranked on the new list.

The last promotions from the 1979 list were made effective January 16, 1987. On July 13, 1987, the 1979 list was cancelled by order of the Commissioner of Personnel.[2]

On October 1, 1987, defendant Galante issued a promotional order, promoting 24 Lieutenants from the new list to the rank of Captain effective October 16, 1987. None of the nine plaintiffs—the highest scoring of whom ranked No. 41 on the new list—was among the 24 promoted. Of the 24 Lieutenants promoted, 18 were white, 5 were black, and one was Hispanic.

II.

In Count I of their complaint, plaintiffs allege that the City has a custom and practice of filling vacancies from the list in effect at the time the vacancies occurred. Compl., par. 20. In other words, they allege they have a protectible property interest in the promotions because it was the City's custom and practice to fill all vacancies before cancelling a list. They also allege, without citing to any

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[2] Plaintiffs allege that they have never been *officially* notified of the termination of the 1979 list, nor have they been *officially* informed by defendants that no further promotions will be made from the 1979 list. Compl., par. 21. Even if this is true, it is irrelevant, since it is clear from the filing of this suit that they have *actual* knowledge of these matters.

specific statute, rule, or regulation, that "pursuant to Illinois law", the City has appointed individuals in rank order from the eligibility lists as the vacancies occur. *Id.*, par. 16. By cancelling the 1979 list and promoting instead from the 1987 list, plaintiffs say, the City deprived plaintiffs of a property interest without due process of law.

In order to prevail on their due process claim, plaintiffs must first establish that they had a protectible property interest in the promotions.[3] The principles governing this determination, as announced in *Perry v. Sindermann,* 408 U.S. 593 (1972), *Board of Regents v. Roth,* 408 U.S. 564 (1972), and their progeny, are well established and need not be set forth in great detail. In order to establish the existence of a protectible property interest, a plaintiff must point to state law, rules, or a mutually explicit understanding that support his claim of entitlement to the benefit he seeks to protect. A unilateral expectation is not enough. Once a plaintiff shows he had a protected property interest, he must then prove he was deprived of that interest without adequate procedural protections.

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[3] It is clear that plaintiffs seek to assert a property interest in the promotions. Plaintiffs might claim that they had a property interest in the right to compete against qualified applicants. If this argument were made, plaintiffs would lose on their due process claim. It is a matter of common sense that the employer, not the employees, determines who is qualified for a position, and there is nothing in the record that indicates the contrary is true in this case. Plaintiffs were given the right to compete, and in fact each of them did compete for the position by taking the exam.

In any event, as the Seventh Circuit observed in a similar case involving promotions, what the plaintiffs are really interested in is the job, not competing for it. *Bigby v. City of Chicago,* 766 F.2d 1053, 1056 (7th Cir. 1985) (". . . it is not the examination that the applicant is interested in—no one likes taking tests—but the job."). Plaintiffs themselves have clearly expressed this view. Complaint, par. 24B (requesting this court to direct defendants to promote plaintiffs to the rank of Captain); Emergency Motion for T.R.O., par. 1 ("plaintiffs have filed this action to gain promotions to the rank of Fire Captain.").

Defendants maintain that plaintiffs cannot establish the existence of a protectible property interest for either of two reasons. First, defendants say, no statute, rule or mutually explicit understanding requires the City to fill vacancies before replacing an eligibility list. Second, even if the City were required by statute, rule or City policy to fill all existing vacancies before replacing an eligibility list, plaintiffs would have no property right to promotion because the Fire Commissioner may exercise discretion in selecting individuals for promotion. We address each of these contentions in turn.

III.

We first examine various written sources as possible bases for a protected property interest. The City's Personnel Rules address the duration of promotional lists. Personnel Rule VII requires that a promotional eligibility list for Firefighters must remain up for at least two years. Thereafter, the Commissioner of Personnel may, in his or her discretion, extend the life of the list for an unspecified period of time.[4] There is nothing in Personnel Rule VII that creates a right to promotion from an eligibility list

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[4] Personnel Rule VII provides in relevant part:

Section 3—General Employment Lists

(d) *Life of Lists*—General employment lists shall have a life of one year, except as otherwise determined by the Commissioner of Personnel. The Commissioner of Personnel may extend the life of a list when in his or her judgment the list is still viable and such extension is for the good of the service.

* * *

Section 4—Promotional Lists

Promotional lists shall be prepared and maintained identically to general employment lists, Section 3(a)-(e) above. In the cases of promotional lists for Sworn Police and Uniformed Firefighter positions, the life of lists shall be at least two years.

Appendix to Accompany Defendants' Motion for Summary Judgment ("Appendix"), Exh. F.

when vacancies occur during its existence. Our review of the record discloses no other Personnel Rule directly related to promotions.

We turn then to the labor contract between the City and the Fire Fighters Union.[5] The contract has been enacted as an ordinance by the City. Appendix, Stensland Aff., par. 4. Section 9.3 of the operative labor contract (Appendix, Exh. A) addresses vacancies and promotions. Section 9.3B.2 provides as follows:

> 2. Promotional vacancies shall be filled by the Commissioner from eligible employees certified from the applicable promotional eligibility list. Employees shall be certified for promotion in order of their rank on the list. The employees certified for promotion shall be the five employees having the highest scores (rank) for each position to be filled, but in no event more than fifteen (15) employees more than the number of vacancies to be filled. Vacancies will customarily be filled by employees in the order of their ranking on the list. An employee certified for promotion to a vacancy may be passed over for any vacancy on an order subject to the following conditions.
>
> a. No employee may be passed over on more than two orders.
>
> b. No employee shall be promoted from a new promotional list until all employees who may have been passed over on a previous promotional order have been promoted.
>
> c. An employee may be passed over on an order only for the following reasons:

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[5] Chicago Fire Fighters Union, Local No. 2 is the exclusive bargaining representative of plaintiffs, who are all members of the uniformed non-exempt ranks. Local No. 2 has had contracts with the City since 1980.

> i. At the time the vacancy occurs the employee is on an injury leave of six months or more for a non-duty related injury; . . . .
>
> ii. A major disciplinary infraction (i.e. charges resulting in a suspension of 15 days or more); . . . .
>
> iii. In order to comply with affirmative action ordered by a court.
>
> The Employer shall specify the specific reason in the event that it decides to pass over an employee on an order.

It might be argued that section 9.3B2.b requires the City to fill existing vacancies before replacing an eligibility list. We find, however, that that section is not applicable because plaintiffs were not "passed over" within the meaning of that section. After examining section 9.3B2.b in context, as well as an arbitration decision construing section 9.3B, we conclude that plaintiffs' failure to be promoted from the old list is *not* the equivalent of being "passed over."

Section 9.3B.2c specifies three grounds upon which the Commissioner may pass over an employee and thus promote out of rank order. An arbitrator has ruled, reading this provision in conjunction with other provisions in the contract, that these three reasons are not exclusive. Rather, the Commissioner also may promote out of rank order if he has "reasonable grounds" for doing so. Opinion and Award of Arbitrator Elliott H. Goldstein in *City of Chicago and Chicago Fire Fighters Union Local No. 2*, Arb. No. 8538 (January 9, 1986) ("Goldstein Arbitration"), and Supplemental Award of the Arbitrator ("Supplemental Award"), Appendix, Exh. B. While the issue in that arbitration was not the meaning of the term "pass over", it is implicit in the decision that the term addresses the following situation. Employee A, who ranks higher on the list than Employee B,

is not promoted; instead, Employee B is promoted. In that situation, Employee B has been promoted out of rank order, and Employee A has been "passed over." *See* Goldstein Arbitration at pp. 37-44; Supplemental Award at p. 10. Here there is no allegation that plaintiffs came up for promotion but were not promoted for a particular reason, valid or otherwise. Instead, the entire list was cancelled, and everyone on that list, and anyone else who wished to compete, was required to take a new examination. Moreover, the Goldstein Arbitration specifically addressed the term "order" as used in section 9.3B2. Although the record is unclear, it appears that plaintiffs were never "on an order" for purposes of that section.

For these reasons, section 9.3B.2.b of the labor contract does not aid the plaintiffs. Plaintiffs were not passed over, thus the provision is inapplicable. Instead, plaintiffs were on a promotional eligibility list for a number of years, and that list was subsequently replaced by a new one. The provision does not support a claim that the City was required to fill existing vacancies—*i.e.*, promote the plaintiffs—before promoting from the new list.

Defendants maintain, and we agree, that, subject to one limitation, the Fire Commissioner has discretion to determine whether and when promotions should be made. The one limitaiton is that promotions are required when necessary to maintain contractual "minimum manning" requirements. In such cases, section 9.3A of the labor contract requires that a position made vacant through attrition must be filled through promotion within 45 days. The City has been successful in maintaining the Commissioner's discretion in determining when vacancies will be filled. In 1986, the Union sought to require the City to fill *all* positions open through attrition within 45 days. The Interest Arbitrator rejected this proposal, stating:

> By this proposal, the Union seeks to force the City to fill all vacancies by promotion within forty-five days of their occurrence. The City argues, and the Arbitrator concurs, that this determination is a management prerogative. The City has the right to decide based on a number of considerations (including but not limited to need, safety and manning requirements) whether or not and when to make a promotion. The proposal is rejected.

Appendix, Exh. C, Award of Arbitrator I.M. Liebermann in *City of Chicago and Chicago Fire Fighters Union Local No. 2, AFL-CIO*, Case No. 51-39-0058-84-R (March 13, 1986) at 23.

In sum, we agree with defendants that the Personnel Rules and labor contract (including arbitration decisions construing that contract) require only that eligibility lists stay up a minimum of two years, and that positions necessary to meet minimum manning requirements be filled within 45 days of becoming vacant. Beyond these restrictions, the City has complete discretion in deciding when to replace eligibility lists and when to make promotions. Furthermore, section 9.3B.2.b of the labor contract, which addresses "pass overs", is not applicable here.

IV.

Having found that no statute, rule or ordinance creates a property interest in promotion, we turn to plaintiffs' allegation that the City's custom and practice created such an interest. Specifically, plaintiffs claim that the City had a custom and practice of filling vacancies from the list in effect at the time the vacancies occurred. Complaint, par. 20. We find that plaintiffs cannot support such a claim.

The source of a protectible property interest may be an employer's unwritten common law, which may be implied from the employer's policies and practices. *Perry*

v. Sindermann, 408 U.S. 593, 601-03 (1973). Yet a plaintiff relying on a custom and practice must still demonstrate the existence of a mutually explicit understanding. *Id.* at 601. Past practice alone is not enough. *Leis v. Flynt,* 439 U.S. 438, 444 n. 5 (1979) ("a constitutional right can[not] be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past.") (Emphasis in original.) *See also Archie v. City of Racine,* 847 F.2d 1211, 1225 (7th Cir. 1988) (Posner, J., concurring) (property interest "cannot be built on a expectation created merely by practices or probabilities" (citing *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 465 (1981))); *Hermes v. Hein,* 742 F.2d 350, 355 (7th Cir. 1984) (property interest cannot be established "solely through the past practices of the employer.").

In a factually similar case, plaintiffs, who were police officers, claimed their employer had a policy of promoting in exact rank order from an eligibility roster. *Hermes v. Hein,* 742 F.2d 350 (7th Cir. 1984). The Seventh Circuit noted that past practices alone could not establish a protected "common law" of employment. *Id.* at 355. The Court concluded plaintiffs had not established the existence of a protectible property interest where there was no evidence from which it could be inferred that the alleged policy was ever promulgated throughout the police department or stated to any of the plaintiffs. *Id.* Moreover, where a plaintiff is relying on verbal or written assurances from the employer, those assurances must be from an entity or person with authority to bind the employer. *Hadley v. County of DuPage,* 715 F.2d 1238, 1242-43 (7th Cir. 1984) (verbal assurances of continued employment from individual County Board members insufficient; the necessary "mutuality" would require an assurance from the County Board itself).

The plaintiffs' own depositions show that the alleged custom and practice was never promulgated or communi-

cated to them by someone with authority to bind the City. They acknowledged that they never received any communication, either oral or written, from anyone in authority in the Fire Department assuring them either that they would be promoted from the 1979 list or that all existing vacancies would be filled before the list would be replaced. Appendix, Dunne Dep. 85-86; Billish Dep. 62-63; Scavone Dep. 40; Jaguszewski Dep. 108-109; Miller Dep. 64-65. As in *Hermes,* given plaintiffs' inability to point to any communications from defendants regarding the alleged policy, we must conclude that the plaintiffs cannot show there was a mutually explicit understanding.

In addition, although plaintiffs allege generally that a custom and practice existed, several of them in their depositions were unable to point to even one instance where all vacancies were filled from an existing list. Appendix, Miller Dep. 105; Billish Dep. 64; Jaguszewski Dep. 111. Thus, not only have the plaintiffs conceded that no one in authority communicated the alleged custom and practice to them, but the plaintiffs themselves appear to have no personal knowledge that the custom and practice was ever followed.

For these reasons, we find that there is no independent source which supports plaintiffs' contention that they had a legitimate claim of entitlement to promotion from the 1979 list. Therefore, they cannot show they had a property interest in the promotions entitling them to due process protections.

V.

Alternatively, defendants argue that even if the City were required by some independent source to fill existing vacancies before replacing an eligibility list, plaintiffs would have no property interest because of the Fire Commissioner's discretion in selecting individuals for promotion.

The promotional process is set forth in section 9.3B.2 of the labor contract, which is reproduced above. The Personnel Department certifies to the Fire Commissioner a number of eligible candidates in excess of the number of vacancies to be filled. Section 9.3B.2 provides that the Commissioner must "customarily" promote in rank order. He may promote out of rank order for any of the three reasons enumerated in section 9.3B.2.a.-c. Moreover, as we have noted, an arbitrator has ruled that these three reasons are not exclusive; the Commissioner "has the right to promote out of rank order" if he has "reasonable grounds" for doing so. Appendix, Exh. B, Goldstein Arbitration at 43.[6]

We agree with defendants that the fact that the Commissioner may, upon reasonable grounds, promote out of rank order defeats plaintiffs' claim of a legitimate entitlement to promotion.

Defendants rely on *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985) and *Houk v. Village of Oak Lawn*, 647 F. Supp. 710 (N.D. Ill. 1986), both of which held that because of the discretion vested in the employer, plaintiffs had only a unilateral expectation of promotion.[7]

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[6] The Goldstein Arbitration involved a Union challenge to certain non-rank order promotions made in 1984 and 1985 to the ranks of Captain and Battalion Chief. A number of the challenged promotions were justified by the City on affirmative action grounds, and these promotions were sustained by the Arbitrator. Goldstein Arbitration at 44, 46. Other non-rank order promotions had been made for reasons unrelated to affirmative action. The Arbitrator ruled in the City's favor as to some but not all of these promotions. See Appendix, Exh. B, Supplemental Award of the Arbitrator (March 18, 1986) at 2-3, 7-9.

It is obvious from the Goldstein Arbitration that the Commissioner has exercised his discretion to promote out of rank order in the recent past. Thus plaintiffs could not claim that defendants' reliance on the Commissioner's discretion is pretextual.

[7] Arguably, *Bigby* may be read as holding that there can *never* be either a property or liberty interest in a promotion. *See Bigby*,

It appears from those decisions that the discretion the defendant employers possessed was broader than the discretion the Fire Commissioner has to promote out of rank order. The Fire Commissioner must have reasonable grounds; grounds accepted by Arbitrator Goldstein included affirmative action goals and pending criminal charges against an employee. Appendix, Exh. B, Supplemental Award at pp. 6, 8. In contrast, in *Houk*, the employer apparently had unfettered discretion to choose one of three candidates for promotion, and in *Bigby*, promotion depended on a number of factors, some of which involved the exercise of discretion.

Nevertheless, we think that the discretion the Fire Commissioner possesses, though limited, makes this case sufficiently similar to *Bigby* and *Houk* that the result is the same. That the Commissioner may promote out of rank order for a number of reasons means that plaintiffs' expectation of promotion from the 1979 list was not so firm and definite an expectation as to rise to the level of a protected property interest. *See Bigby*, 766 F.2d at 1056. The Seventh Circuit has described a property interest as that which "is securely and durably yours under state . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 417 (7th Cir. 1988) (quoting *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983)). Because of the Commissioner's limited right to promote out of rank order, the rank of Captain (which, after all, is what the plaintiffs really want) did not "securely and durably" belong to plaintiffs, but rather was "uncertain", even assuming that defendants were required to fill all vacancies from the 1979 list before replacing it with a new list.

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766 F.2d at 1059-60. However, defendants do not argue for such a reading, and the point is, as we said, arguable.

Significantly, plaintiffs' depositions reveal that *they* didn't even have a firm expectation that promotions would be made in rank order. Plaintiff Herling stated that "there's not even a promise that when the list gets posted that the number one guy could get promoted. That's how much of a promise you've got from the City." Appendix, Herling Dep. 106; see also Carasotti Dep. 32; Graf Dep. 77. They believed that, at least in the past, promotional decisions were sometimes based on favoritism or politics, and they knew that various events such as a promotional freeze or the City's affirmative action goals might mean their promotions wouldn't come through. Herling Dep. 42-44; Dunne Dep. 12-13; Billish Dep. 22-25, 42-44; Scavone Dep. 22. Thus, plaintiffs evidently viewed what they claim to be a custom and practice as, in reality, something that was subject to a variety of contingencies.

In sum, we find that, even assuming defendants were required to fill vacancies from the list posted at the time the vacancies occurred, plaintiffs would lack a property interest in promotion to the rank of Captain.

Having determined that plaintiffs possessed no protectible property interest, we need not address the second prong of the due process analysis, whether plaintiffs were deprived of an interest without adequate procedural protections.[8]

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[8] In a Minute Order dated September 27, 1988, we allowed plaintiffs leave to file their cross-motion for summary judgment on Count II, the equal protection count, and set a briefing schedule. Since the motion directed to the due process claim already had been taken under advisement, our Order did not contemplate that the parties would again address that claim. Thus we have not considered defendants' additional arguments and evidentiary material on the due process claim that are contained in their brief filed November 4, 1988.

We note in passing, however, that an arbitrator's award issued May 23, 1988 is consistent with our conclusions in this opinion in two respects. The Arbitrator ruled, among other things, that the City has the right to determine who is qualified for the position

For the foregoing reasons, we find that there is no genuine issue of material fact that defendants are entitled to judgment as a matter of law on Count I of the complaint, the due process claim. Partial summary judgment is granted in favor of defendants and against plaintiffs on Count I of the complaint.

Enter:

/s/ James B. Zagel
JAMES B. ZAGEL
United States District Judge

Date: Nov. 28, 1988

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of Captain (see *supra* note 3). He also ruled that employees are entitled to promotion before retirement of an eligibility list only when they have been bypassed for promotion after having first been listed for promotion on a promotional order (see *supra* pp. 9-11.). Exhibit B to City of Chicago's Mem. in Opp. to Plaintiffs' Cross Motion for Partial Summary Judgment, Opinion and Award of Arbitrator Edwin H. Benn in *Chicago Firefighters Union, Local No. 2 and City of Chicago* (May 23, 1988) at 30-31, 35.